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

Proceeding	92060914
Party	Defendant SnoWizard, Inc.
Correspondence Address	KENNETH L TOLAR SNOWIZARD INC 2908 HESSMER AVENUE, SUITE 2 METAIRIE, LA 70002 UNITED STATES Email: tolar@tolarlawoffice.com
Submission	Motion to Strike
Filer's Name	Kenneth L Tolar
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Date	09/13/2017
Attachments	motion to strike.pdf(38761 bytes) memo in support of Motion to strike.extend.pdf(67305 bytes)

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

In the Matter of Trademark Registration No.: 4,157,907, WHITE CHOCOLATE & CHIPS®

Cancellation No. 92060914

Snow Ball's Chance, Ltd.

v.

SnoWizard, Inc.

VIA ETTSA
Assistant Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MOTION TO STRIKE NOTICE OF RELIANCE, TRIAL TESTIMONY AND TRIAL BRIEF OF PETITIONER, AND FOR AN EXTENSION OF TIME TO FILE DEFENDANT'S TRIAL BRIEF

Registrant, SnoWizard, Inc. ("SnoWizard" or "Defendant") hereby moves the Board for an order striking Petitioner's trial testimony, notice of reliance and trial brief as being untimely, and for an order extending the time period for filing Defendant's trial brief for the reason set forth in the attached memorandum.

Respectfully submitted,

kenneth l. tolar
Kenneth L. Tolar
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike Petitioner's Notice of Reliance, Trial Testimony and Trial Brief, and for an Extension of Time to File Defendant's Trial Brief has been served electronically upon:

Mark E. Andrews
Andrews Arts & Sciences Law, LLC
7104 Coliseum Street
New Orleans, Louisiana 70118
mea@mealaw.com

on this 13th day of September, 2017.

/kenneth l. tolar/
Kenneth L. Tolar

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In the Matter of Trademark Registration No.: 4,157,907, WHITE CHOCOLATE & CHIPS®

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Snow Ball's Chance, Ltd.

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Box TTAB NO FEE
Assistant Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE NOTICE OF RELIANCE, TRIAL TESTIMONY AND TRIAL BRIEF OF PETITIONER, AND FOR AN EXTENSION OF TIME TO FILE DEFENDANT'S TRIAL BRIEF

Registrant, SnoWizard, Inc. ("SnoWizard" or "Defendant") hereby moves the Board for an order striking Petitioner's trial testimony, notice of reliance and trial brief as being untimely, and for an order extending the time period for filing Defendant's trial brief for the following reasons.

I. FACTS

In case no. 06-9170 c/w 09-3394, 10-791 and 11-1499 in the Eastern District of Louisiana (hereinafter "the consolidated cases"), Petitioner's attorney, Mr. Mark Andrews, represented numerous other parties, *inter alia,* Southern Snow Mfg. Co., Inc. ("Southern Snow") and Snow Ingredients, Inc. ("Snow Ingredients"), all of which repeatedly attacked SnoWizard's intellectual property rights, including the valid trademark registrations for WHITE CHOCOLATE & CHIPS® (at issue herein), CAJUN RED HOT® and MOUNTAIN MAPLE® (hereinafter "the registered trademarks"). In the consolidated cases, Mr. Andrews repeatedly

challenged the validity of the registered trademarks on the basis that they are generic, merely descriptive and functional, and because the registrations were purportedly obtained by fraud. These arguments are identical to those set forth in each of three separate TTAB cancellation proceedings attacking the above-referenced trademarks. After years of litigation in the consolidated cases and a two-week jury trial, the court ordered that SnoWizard owns a valid and enforceable federally registered trademark in each of the three above-referenced trademarks. The judgment was affirmed by the U.S. Court of Appeals for the Federal Circuit, and the plaintiffs' petition for a writ of certiorari to the United States Supreme Court was denied. Copies of the judgments were previously filed into the record with Defendant's notice of reliance on May 1, 2017.

In spite of exhausting all available appeals of the final judgment that the trademarks are valid, registered trademarks belonging to SnoWizard, and that such trademarks were infringed by Mr. Andrews's clients, Mr. Andrews instituted the three separate TTAB proceedings on behalf of a mere proxy of Southern Snow and Snow Ingredients-i.e., Snow Ball's Chance, Ltd., the petitioner herein-that yet again attacks the validity of the trademark by asserting the identical legal arguments that he asserted in the consolidated cases. Since filing the duplicative, meritless proceedings herein, Petitioner has repeatedly refused to cooperate in discovery, has engaged in obstructive and dilatory conduct and has blatantly, defiantly and repeatedly refused to comply with the Board's deadlines.

On April 7, 2016, the Board in this proceeding issued a scheduling order setting numerous deadlines, including the following:

Plaintiff's 30-day Trial Period Ends 3/3/2017

Defendant's Pretrial Disclosures 3/18/2017

Defendant's 30-day Trial Period Ends 5/2/2017

Plaintiff's Rebuttal Disclosures 5/17/2017

Plaintiff's 15-day Rebuttal Period Ends 6/16/2017. (Rec Doc. 10).

Petitioner filed no notice of reliance, evidence or trial testimony during its opening trial period, which ended on March 3, 2017, or during its rebuttal period, which ended on June 16, 2017. On August 29, 2017, three months after its rebuttal period ended, Petitioner filed its first and only notice of reliance, and submitted trial testimony in the form of a declaration. The notice of reliance and the trial-testimony declaration that were untimely filed on August 29, 2017 are the only trial evidence Petitioner has submitted in this matter.

Furthermore, pursuant to the Board's order, Petitioner's trial brief was due sixty (60) days after its rebuttal testimony period ended, or no later than August 15, 2017. Inexplicably and without otherwise seeking leave from the Board to do so, Petitioner filed its trial brief on September 6, 2017, more than 3 weeks after the deadline set by the Board.[1] Along with the untimely brief, Petitioner even audaciously filed a request for oral argument in order to subject SnoWizard to needless travel costs to defend this frivolous proceeding in spite of Petitioner having no bona fide interest in pursuing or prosecuting this matter.

II. ARGUMENT

According to 37 CFR § 2.122(g), a notice of reliance shall be filed during the testimony period of the party that files the notice. TBMP §703.01(a) further provides, "in addition to submission of evidence under notices of reliance, parties may introduce evidence in the form of testimony depositions taken by a party during its assigned testimony period, or in the form of

[1]Although Petitioner's untimely pleadings were filed with the Board, they were never served upon Defendant or its counsel of record in violation of 37 CFR 2.119.

affidavit or declaration testimony *submitted during its testimony period*, subject to the right of the adverse party to conduct cross-examination. The submission of evidence and testimony during the parties' assigned testimony periods corresponds to the trial in court proceedings."

According to the deadlines set by the Board, Petitioner's notice of reliance and declaration were due no later than March 3, 2017. Even though Petitioner filed no evidence or other testimony during its testimony period, Defendant filed a trial declaration on April 25, 2017, and a notice of reliance on May 1, 2017. Even assuming that on August 29, 2017, Petitioner was attempting to submit documents that could be characterized as rebuttal evidence, such evidence by rule had to be filed no later than June 16, 2017. Instead, Petitioner now wishes to file the evidence more than two months after the mandated deadline. Moreover, Petitioner filed such evidence without first seeking an extension of time or otherwise obtaining Board approval that would allow such an untimely filing. Petitioner simply assumes that it is entitled to ignore the Board's deadlines and file its evidence at a time it deems fit.

According to TBMB 532, "when a notice of reliance under any of the aforementioned rules is filed after the close of the offering party's testimony period, an adverse party may file a motion to strike the notice of reliance and, thus, the evidence submitted thereunder, in its entirety, as untimely." 37 CFR § 2.121(a) provides that the Board will issue a trial order setting a deadline for each party's required pretrial disclosures and assigning to each party its time for taking testimony and presenting evidence ("testimony period"). No testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board." TBMB 503.01 further provides "when there is no such approved stipulation, granted motion, or Board order, and a testimony deposition is taken after the close of the deposing party's testimony

period, an adverse party may file a motion to strike the testimony deposition, in its entirety, as untimely." In this matter, Petitioner filed evidence more than two months after the deadline set by the Board. Petitioner did not previously request an extension of time or otherwise seek Board approval to file such evidence after the deadline and no such approval exists. Therefore, the notice of reliance, all evidence submitted thereunder and the declaration should be stricken as untimely.

Petitioner's brief should likewise be stricken as being untimely. According to 37 CFR 2.128, "the brief of the party in the position of plaintiff shall be due not later than sixty days after the date set for the close of rebuttal testimony. The brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief." If a brief on the case is not timely filed, or violates the length limit or other format requirements specified in 37 CFR § 2.128(b), it may be stricken, or given no consideration, by the Board." TBMB §801.02. In this matter, Petitioner's trial brief was filed over three weeks after the sixty-day deadline set forth in 37 CFR 2.128, and without an order from the Board allowing the late filing or a contemporaneous motion seeking such an order. The Board has stricken trial briefs under nearly identical circumstances. See for example *Ariola-Eurodisc Gesellschaft v. Eurotone International Ltd.*, 175 USPQ 250, 250 (TTAB 1972) wherein a brief filed three weeks late was stricken as being untimely. Therefore, considering Petitioner's repeated failure to adhere to the Board's scheduling order, and the untimeliness of Petitioner's trial brief, it should also be stricken along with the notice of reliance and declaration. Furthermore, in the event that the Board does not strike Petitioner's brief, Defendant hereby moves the Board for an order extending the time period in which it must file a brief. Pursuant to the original scheduling order, Defendant's brief was due on September 14, 2017. However, Petitioner's untimely brief was not

filed until September 6, 2017. Without an extension of time, Defendant would be afforded a mere eight days to respond to Petitioner's untimely brief.

As explained, *supra*, in addition to seeking cancellation of WHITE CHOCOLATE & CHIPS in this matter, Mr. Andrews also again sought cancellation of MOUNTAIN MAPLE in proceeding number 92062751 and CAJUN RED HOT in Cancellation no. 92060915. In proceeding no. 92062751, Petitioner was sanctioned for repeatedly refusing to respond to discovery, to comply with deadlines or to otherwise prosecute the case. In ruling on Defendant's motion for sanctions, the Board dismissed the proceeding with prejudice. (Rec. Doc. 13). The Board concluded that "it is apparent from Petitioner's pattern of dilatory and obstructive conduct that any sanction short of judgment would be futile and unfair to Respondent."

Following the same pattern at issue herein, Petitioner in proceeding no. 92060915 failed to submit any evidence, trial testimony or a trial brief, either late or otherwise, although Defendant again filed and served evidence during its assigned testimony period. On August 28, 2017, the Board issued an order *sua sponte* demanding Petitioner to show cause no later than September 27, 2017 "why the Board should not treat the failure to file a brief as a concession of the case, failing which a judgment dismissing the petition for cancellation with prejudice will be entered." Interestingly, the trial brief in proceeding no. 92060915 was due August 15, 2017, the same day the brief in this matter was due. Apparently in response to the Board's order to show cause, Petitioner now is scrambling to somehow salvage this matter from a similar fate by desperately filing untimely pleadings after ignoring the matter since its inception. However, it is readily apparent that Petitioner or its attorney cannot possibly produce any evidence that the registered trademarks are invalid, and these duplicative, frivolous proceedings were filed merely to further harass SnoWizard.

III. CONCLUSION

As is readily apparent from the above, Petitioner's attorney is simply perpetuating his relentless assault on Defendant's trademarks with little or no intention or desire to prosecute these proceedings. Petitioner's intended harassment is evidenced by its incredulous request for oral argument filed concurrently with untimely trial pleadings in a desperate effort to subject SnoWizard to unnecessary travel costs. Petitioner cannot possibly in good faith believe that it will prevail in these matters considering the outcome of the consolidated cases, and the fact that it has produced no evidence whatsoever that the marks are invalid. The lack of any good faith belief in Petitioner's frivolous contentions is evidenced by its continuous disregard of Board rules and deadlines, and its continuous refusal to submit evidence or to remotely cooperate in discovery. For the foregoing reasons, Registrant, SnoWizard, Inc., hereby respectfully requests that the Board issue an order striking Petitioner's notice of reliance, trial testimony, and trial brief, ordering Petitioner to show cause pursuant to 37 CFR 2.128(a)(3) why this matter should not be dismissed, and extending the time period within which Defendant must file its trial brief in the event the proceeding is not dismissed.

Respectfully submitted,

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on this 13th day of September, 2017.

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