THIS OPINION IS NOT A PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: September 25, 2018

Cancellation No. 92060914

Snow Ball's Chance, Ltd.

v.

SnoWizard, Inc.

Michael B. Adlin, Administrative Trademark Judge:

Pursuant to the Board's order of April 7, 2016, Petitioner's trial period closed on March 3, 2017. 7 TTABVUE.[1] Petitioner failed to file any testimony or submit any other evidence during its trial period.

However, on August 29, 2017, Petitioner filed the Declaration of George Miller, its President, and a Notice of Reliance. 13 TTABVUE; 14 TTABVUE. The Miller Declaration is dated March 2, 2017, within Petitioner's testimony period, but was untimely filed without a certificate of service. The Notice of Reliance and its accompanying certificate of service are both dated August 29, 2017 and untimely by

[1] Citations reference TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

any measure. Petitioner later filed an untimely Trial Brief on September 6, 2017. 15 TTABVUE; Trademark Rule 2.128(a)(1).

One week later Respondent filed its motion to strike Petitioner's Declaration, Notice of Reliance and Trial Brief as untimely, which was granted as conceded because Petitioner failed to oppose the motion. 17 TTABVUE; 19 TTABVUE. Petitioner was then allowed time to show cause why its failure to timely file a trial brief should not be treated as a concession of the case. 20 TTABVUE.

In its response to the order to show cause, 21 TTABVUE, Petitioner points out that it filed two other Board proceedings against the same Respondent, Cancellation Nos. 92060915 and 92062751, and was "trying to manage three separate proceedings with different deadlines, all of which had been suspended and re-set, which created very confusing docket-management traps." 21 TTABVUE 2. In fact, while Cancellation No. 92060915 involves a different mark and registration than are at issue in this case, it proceeded much the same way as this case. That is, Petitioner also failed to timely (or ever) file a trial brief in that proceeding, leading to the Board's order to show cause why that case should not be dismissed for Petitioner's failure to file a trial brief. Cancellation No. 92060915, 11 TTABVUE. In its response to the show cause order in Cancellation No. 92060915, Petitioner made an essentially identical argument to the one it makes here. Cancellation No. 92060915, 12 TTABVUE 3 ("Different trial schedules and deadlines were set for the [then three co-pending]

cancellations,[2] and those schedules and deadlines were re-set at least once each. Petitioner's undersigned counsel became confused about the deadlines, and mistakenly allowed the briefing deadline to pass.").

There are other similarities between the arguments Petitioner made in Cancellation No. 92060915 and those it makes here. For example, in both proceedings Petitioner points out that it timely served the Miller Declaration, even though it filed the Declaration late in each proceeding. *Compare* 21 TTABVUE 3 *with* Cancellation No. 92060915, 12 TTABVUE 3. And even though the two proceedings involve completely different marks, Petitioner seeks to rely on the exact same Miller Declaration in each proceeding. *Compare* 13 TTABVUE *with* Cancellation No. 92060915, 12 TTABVUE 45-48. Accordingly, it is appropriate to treat Petitioner's untimely filings and responses to the orders to show cause the same in both proceedings.

In Cancellation No. 92060915, the Board granted in part Petitioner's construed motion to reopen its testimony period, to the extent it reopened the period "for the sole purpose of treating Petitioner's trial brief, notice of reliance and testimony, attached to its motion, as timely." Cancellation No. 92060915, 15 TTABVUE 4. Respondent in Cancellation No. 92060915 was then given time to supplement its earlier filings, "as necessary." *Id.* Accordingly, we do the same here, and hereby vacate the orders granting Respondent's motion to strike the Miller Declaration and

[2] Cancellation No. 92062751 was dismissed on April 17, 2017 as a discovery sanction for "Petitioner's pattern of dilatory and obstructive conduct." Cancellation No. 92062751, 13 TTABVUE 8.

Petitioner's Notice of Reliance and Trial Brief. The Miller Declaration, and Petitioner's Notice of Reliance and Trial Brief are hereby accepted as timely filed for whatever evidentiary or persuasive value they may have under the Trademark Rules of Practice and Federal Rules of Evidence. As in Cancellation No. 92060915, and to obviate any prejudice to Respondent, Respondent is allowed until **November 5, 2018** to supplement its evidentiary submissions and file a Trial Brief, if it desires to do so. Petitioner's Trial Reply Brief, if any, is due pursuant to Trademark Rule 2.128(a)(1).

***