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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	SNOWIZARD INC 101 RIVER ROAD JEFFERSON, LA 70121 UNITED STATES
Submission	Motion to Suspend for Civil Action
Filer's Name	Kenneth L Tolar
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Date	04/01/2015
Attachments	motion to suspend WCC.pdf(39709 bytes) Exhibit A.pdf(145181 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.

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

MOTION TO SUSPEND PROCEEDINGS PURSUANT TO 37 C.F.R. §2.117

Registrant, SnoWizard, Inc. ("SnoWizard") hereby moves the Board for an order suspending this cancellation proceeding pursuant to 37 C.F.R. §2.117 because the parties are involved in a pending civil action concerning the registered trademark at issue, WHITE CHOCOLATE & CHIPS®. SnoWizard has filed a complaint for a declaratory judgment of trademark validity with the United States District Court for the Eastern District of Louisiana, a stamped copy which is attached hereto as Exhibit A. The basis for the declaratory judgment action is that in EDLA case no. 06-9170 c/w 09-3394, 10-791 and 11-1499 ("the consolidated cases"), Petitioner's attorney, 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 registration for WHITE CHOCOLATE & CHIPS®. In the consolidated cases, Mr. Andrews repeatedly

challenged the validity of WHITE CHOCOLATE & CHIPS® on the basis that it is generic, merely descriptive and functional, and because the registration was purportedly obtained by fraud.

After years of litigation in the consolidated cases, including substantial motion practice and a two-week jury trial, the Court ordered that:

> "SnoWizard, Inc. owns a valid and enforceable federally registered trademark in WHITE CHOCOLATE & CHIPS; that Southern Snow Mfg. Co., Inc. and Snow Ingredients, Inc. used a reproduction, counterfeit, copy, or colorable imitation of the trademark WHITE CHOCOLATE & CHIPS in a manner that was likely to cause confusion or to cause mistake, or to deceive as to the source, origin, sponsorship, or approval of such product; and that SnoWizard, Inc. is entitled to recover from Southern Snow Mfg. Co. the profits gained from the infringement of the trademark WHITE CHOCOLATE & CHIPS in the amount of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS, together with legal interest from the date of judicial demand until paid; it is further declared that Southern Snow Mfg. Co., Inc. and Snow Ingredients, Inc. willfully infringed the trademark WHITE CHOCOLATE & CHIPS and that Southern Snow Mfg. Co., Inc.'s and Snow Ingredients, Inc.'s conduct was unethical, oppressive, unscrupulous, or deceptive as to their use of the trademark WHITE CHOCOLATE & CHIPS and SnoWizard, Inc. is entitled to 'the costs of the action.'"

The portion of the trial court judgment quoted above 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. In spite of exhausting all available appeals of the final judgment that WHITE CHOCOLATE & CHIPS® is a valid, registered trademark belonging to SnoWizard, and that such trademark was infringed by Mr. Andrews's clients, Mr. Andrews has now instituted a new action 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. Therefore, SnoWizard filed a complaint for declaratory judgment seeking to again have the registered trademark declared valid under the doctrine of *res judicata* and other

legal principles. For the foregoing reasons, SnoWizard respectfully requests that this matter be suspended since the pending civil action will have a bearing on this case and because either party herein may appeal any decision of the Board to a district court pursuant to 15 U.S.C. §1071(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Suspend Proceedings has been served electronically and by First class Mail upon:

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

on this 1st day of April, 2015.

/kenneth l. tolar/
Kenneth L. Tolar

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SNOWIZARD, INC.	*	**CIVIL ACTION**
	*	
	*	
	*	**CASE NO.**
vs.	*	
	*	**SECT.**
	*	
SNOW BALL'S CHANCE, LTD	*	**MAGISTRATE**
	*	
	*	**JURY TRIAL DEMANDED**

****

COMPLAINT FOR DECLARATORY JUDGMENT OF TRADEMARK VALIDITY

NOW INTO COURT, through undersigned counsel, comes Plaintiff, SnoWizard, Inc., (hereinafter "Plaintiff"), which respectfully avers that:

Parties

1.

Plaintiff, SnoWizard, Inc., is a Louisiana corporation with its principal place of business in Jefferson, Louisiana.

Exhibit A

2.

Defendant, Snow Ball's Chance, Ltd. (hereinafter "Defendant") is a Louisiana Corporation domiciled in Metairie, Louisiana.

3.

Defendant is and has been doing business, and has committed acts and caused damages, in this judicial district at all times relevant hereto.

Jurisdiction and Venue

4.

This is a declaratory action for a judgment of trademark validity arising under the Lanham Act, 15 U.S.C. §1051 *et seq.*, and subject matter jurisdiction herein is based upon 15 U.S.C. §1121, and 28 U.S.C. §§1331, 1338 and 2201.

5.

Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(b) and (c) because Defendant is doing business and "resides" in this judicial district as defined by 28 U.S.C. §1391(c), and a substantial part of the events or omissions giving rise to this claim occurred in this district.

Facts

6.

On November 15, 2011, SnoWizard filed an application with the United States Patent and Trademark Office ("USPTO") to register the trademark CAJUN RED HOT®.

7.

On June 12, 2012, the USPTO issued Certificate of Registration number 4157906 to SnoWizard for the trademark CAJUN RED HOT® in conjunction with flavoring concentrates for non-nutritional purposes, "namely, flavoring concentrates for shaved ice confections."

8.

On July 25, 2008, the Louisiana Secretary of State issued a certificate of registration to SnoWizard for the mark CAJUN RED HOT®.

9.

On November 15, 2011, SnoWizard filed a trademark application with the USPTO to register WHITE CHOCOLATE & CHIPS®.

10.

On June 12, 2012, the USPTO issued Certificate of Registration number 4157907 to SnoWizard for the trademark WHITE CHOCOLATE & CHIPS® in conjunction with flavoring concentrates for non-nutritional purposes, "namely, flavoring concentrates for shaved ice confections."

11.

On November 17, 2006, the Louisiana Secretary of State issued to SnoWizard a certificate of registration for the mark WHITE CHOCOLATE & CHIPS.

12.

In EDLA case no. 06-9170 c/w 09-3394, 10-791 and 11-1499 ("the consolidated cases"), Defendant's counsel, 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 CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS®.

13.

In the consolidated cases, Mr. Andrews repeatedly challenged the validity of CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® on the basis that they are generic, merely descriptive and functional, and because the aforementioned registrations were purportedly obtained by fraud.

14.

After years of litigation, including substantial motion practice and a two-week jury trial, the Court ordered that:

> "SnoWizard, Inc. owns a valid and enforceable federally registered trademark in CAJUN RED HOT; that Southern Snow Mfg. Co., Inc. and Snow Ingredients, Inc. used a reproduction, counterfeit, copy, or colorable imitation of the trademark CAJUN RED HOT in a manner that was likely to cause confusion or to cause mistake, or to deceive as to the source, origin, sponsorship, or approval of such product; and that SnoWizard, Inc. is entitled to recover from Southern Snow Mfg. Co. the profits gained from the infringement of the trademark CAJUN RED HOT in the amount of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS, together with legal interest from the date of judicial demand until paid; it is further declared that Southern Snow Mfg. Co., Inc. and Snow Ingredients, Inc. willfully infringed the trademark CAJUN

RED HOT and that Southern Snow Mfg. Co., Inc.'s and Snow Ingredients, Inc.'s conduct was unethical, oppressive, unscrupulous, or deceptive as to their use of the trademark CAJUN RED HOT and SnoWizard, Inc. is entitled to 'the costs of the action.'" EDLA case no. 11:1499, Rec. Doc. 12, p. 7, ¶17.

15.

The Court also ordered that:

"SnoWizard, Inc. owns a valid and enforceable federally registered trademark in WHITE CHOCOLATE & CHIPS; that Southern Snow Mfg. Co., Inc. and Snow Ingredients, Inc. used a reproduction, counterfeit, copy, or colorable imitation of the trademark WHITE CHOCOLATE & CHIPS in a manner that was likely to cause confusion or to cause mistake, or to deceive as to the source, origin, sponsorship, or approval of such product; and that SnoWizard, Inc. is entitled to recover from Southern Snow Mfg. Co. the profits gained from the infringement of the trademark WHITE CHOCOLATE & CHIPS in the amount of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS, together with legal interest from the date of judicial demand until paid; it is further declared that Southern Snow Mfg. Co., Inc. and Snow Ingredients, Inc. willfully infringed the trademark WHITE CHOCOLATE & CHIPS and that Southern Snow Mfg. Co., Inc.'s and Snow Ingredients, Inc.'s conduct was unethical, oppressive, unscrupulous, or deceptive as to their use of the trademark WHITE CHOCOLATE & CHIPS and SnoWizard, Inc. is entitled to 'the costs of the action.'" EDLA Case no. 11:1499, Rec. Doc. 12, p. 7, ¶17.

16.

After nearly a two-week trial, the Court determined that Southern Snow and Snow Ingredients *wilfully* infringed SnoWizard's *valid and enforceable* trademarks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS®, and assessed damages accordingly.

17.

After judgment was rendered in favor of SnoWizard, and against Southern Snow and Snow Ingredients, Mr. Andrews appealed the verdict to the Court of Appeals for the

Federal Circuit.

18.

The Court of Appeals for the Federal Circuit affirmed the trial court's verdict and ruled that CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are valid trademarks owned by SnoWizard. Exhibit A, p. 31.

19.

The Court of Appeals for the Federal Circuit also affirmed the trial court's verdict that Southern Snow and Snow Ingredients infringed the valid and enforceable trademarks. Exhibit A, p. 31.

20.

Mr. Andrews then unsuccessfully petitioned the United States Supreme Court for a writ or certiorari, thereby exhausting all available appeals relative to the two registered trademarks.

21.

In spite of exhausting all available appeals of the final judgment that CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are valid, registered trademarks belonging to SnoWizard, and that such trademarks were infringed by Mr. Andrews's clients, Mr. Andrews has now instituted a new action that yet again attacks the validity of the trademarks by asserting the identical legal arguments that he asserted in the consolidated cases.

22.

Mr. Andrews has an extensive, well-documented history of simply re-filing previously asserted, finally adjudicated claims when all other available options have been foreclosed.

23.

Now that Mr. Andrews cannot appeal the trial court's decisions any further, he has recruited a disinterested snowball stand to yet again attack the trademarks by filing petitions to cancel the registrations with the United States Trademark Trial and Appeal Board. Exhibits B and C.

24.

In the aforementioned petitions for cancellation, Mr. Andrews regurgitates the same unsustainable, adjudicated and rejected theories that he argued in the consolidated cases, i.e., the trademarks are invalid due to Southern Snow's concurrent infringing use and because Defendant is somehow prevented from marketing and selling similar products.

25.

Defendant also asserts the identical, baseless grounds for cancellation that were argued in the consolidated cases, i.e., that the registered marks are generic, merely descriptive, functional and were obtained by fraud.

26.

All of these arguments were rejected by the jury in the consolidated cases, and the trial court's Judgment on Jury Verdict was affirmed by the Federal Circuit.

27.

In fact, as stated above, the jury found that Southern Snow's use of the registered marks constituted copying and wilful infringement.

28.

As he has repeatedly done in the consolidated cases and others, Mr. Andrews is simply recruiting parties who have no interest whatsoever in the trademarks at issue, or in any of the other issues in the consolidated cases, in order to re-litigate by proxy unsuccessful claims and issues on behalf of Southern Snow and Snow Ingredients.

First Claim for Relief-Declaratory Judgment that the Registered Trademarks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are Valid and Enforceable under the Doctrine of *Res Judicata*

29.

All allegations in Paragraphs 1-28 herein are repeated and incorporated by reference.

30.

By filing the petitions for cancellation in the United States Trademark Trial and Appeal Board, Defendant has created an actual case or controversy between the parties herein, entitling Plaintiff to seek a declaration of its rights pursuant to 28 U.S.C. §§2201

and 2202.

31.

Because either party may appeal any decision of the United States Trademark Trial and Appeal Board to a district court pursuant to 15 U.S.C. §1071(b), Plaintiff is entitled to seek declaratory relief in this Court.

32.

Mr. Andrews, by recruiting a non-party litigant to assert the same claims previously asserted by Southern Snow, Snow Ingredients and the other multitude of Plaintiffs that Southern Snow recruited in the consolidated cases, is simply attempting to re-litigate finally adjudicated claims.

33.

In the consolidated cases, the trial court found that "SnoWizard, Inc. owns a valid and enforceable federally registered trademark in" CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS®.

34.

Accordingly, Defendant, Snow Ball's Chance is barred by the doctrine of claim and issue preclusion from again asserting that the marks are invalid.

35.

The issue of whether CAJUN RED HOT® or WHITE CHOCOLATE & CHIPS® is a valid and enforceable trademark that belongs to Snowizard has been judicially

determined and cannot be re-litigated by non-party proxies that Mr. Andrews or Southern Snow appoints.

36.

Furthermore, the petitions for cancellation that Mr. Andrews filed clearly indicate that Defendant is merely an agent or proxy of Southern Snow, Snow Ingredients and/or Mr. Andrews.

37.

For example, in each of the cancellation petitions, Defendant alleges that it "prefers to do business with Alternative-Suppliers and avoid doing business with SnoWizard" and that "Southern Snow is an alternative supplier, and has been a preferred supplier for petitioner Snow Ball's Chance for years." Exhibits B and C, p. 5, ¶¶17-18.

38.

Defendant also alleges that Alternative-Supplier Southern Snow offered and sold the flavor concentrate "'White Chocolate & Chips' from 1996 continuously through 2012." Exhibit B, p. 5, §23.

39.

Defendant further alleges that Alternative-Supplier Southern Snow offered and sold the flavor concentrate "'Cajun Red Hot' from 2010 continuously through 2012." Exhibit C, p. 5, §24.

40.

The above-quoted assertions are the identical arguments that Mr. Andrews and Southern Snow, et al. unsuccessfully argued to the trial court and jury in the consolidated cases.

41.

Defendant alleges that SnoWizard's registrations of the judicially validated trademarks prevent "alternative suppliers" i.e., Southern Snow, from labeling any flavoring concentrate as "White Chocolate & Chips" or "Cajun Red Hot." Exhibits B and C, p. 8, ¶46.

42.

It is clear from the allegations in the petitions for cancellation that Defendant is simply re-instituting the previously adjudicated claims on behalf of its principal, Southern Snow, which is clearly barred under *res judicata* as claim and/or issue preclusion.

43.

Defendant's agency-principal relationship with Southern Snow is further established by the fact that Mr. Andrews is representing Defendant in the cancellation petitions and also represented Southern Snow and its recruits throughout the consolidated cases.

44.

Furthermore, Mr. Andrews is simply repeating his longstanding practice of

harassing SnoWizard with duplicative filings whenever he loses a claim and exhausts all other available remedies.

Second Claim for Relief-Declaratory Judgment that the Registered Trademarks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are Valid and Enforceable

45.

All allegations in Paragraphs 1-31 herein are repeated and incorporated by reference.

46.

Additionally and in the alternative, if the Court were to determine that *res judicata* does not apply, the registered trademarks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are valid and enforceable as a matter of law.

47.

Pursuant to 15 U.S.C. § 1057(b), the certificates of registration for the marks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are prima facie evidence of their validity.

48.

The trademarks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS® are arbitrary, fanciful and suggestive of the unique taste, smell and appearance of the corresponding food flavoring concentrate for shaved ice confections manufactured by SnoWizard.

49.

Since at least May 31, 1988, SnoWizard has continuously and exclusively used the trademark CAJUN RED HOT® in Louisiana and in interstate commerce on and in connection with food flavoring concentrates manufactured by SnoWizard using a proprietary secret formula, and sold by SnoWizard to vendors of shaved ice confections and other confectioners.

50.

In addition, as a result of SnoWizard's continuous and exclusive use of the trademark CAJUN RED HOT® in connection with a food flavoring concentrate for shaved ice confections, the mark has acquired a high degree of distinctiveness and secondary meaning among vendors of shaved ice confections and other confectioners, who associate the mark with the corresponding food flavoring concentrate manufactured by SnoWizard.

51.

The trademark CAJUN RED HOT® represents a substantial investment of time, money and goodwill by SnoWizard.

52.

SnoWizard owns a protectable proprietary interest in the trademark CAJUN RED HOT®.

53.

SnoWizard has the exclusive rights to use and exclude others from using the trademark CAJUN RED HOT® in the State of Louisiana and in interstate commerce on and in connection with food flavorings.

54.

In the consolidated cases, SnoWizard developed evidence that clearly established that CAJUN RED HOT®, even if deemed to be merely descriptive, had acquired secondary meaning and is, therefore, a protectable and registerable trademark belonging to SnoWizard.

55.

Specifically, the evidence was obtained from the President of Southern Snow, Milton Wendling, who admitted in deposition testimony that SnoWizard had exclusively used the term CAJUN RED HOT® in commerce from the late 1990's until 2010.

56.

Furthermore, Mr. Wendling admitted that Southern Snow misappropriated the trademark CAJUN RED HOT® in 2010 after receiving numerous customer requests for the product sold under such mark by SnoWizard.

57.

Previously, Southern Snow had offered a similar product under the mark FIREBALL but the SnoWizard product sold under the mark CAJUN RED HOT®

became so popular that Mr. Wendling decided to apply the term CAJUN RED HOT® to the product sold under the name FIREBALL.

58.

Furthermore, Mr. Wendling admitted that he also copied SnoWizard's trademark CAJUN RED HOT® because he became weary of explaining to customers and potential customers that the product sold under the trademark FIREBALL was the same or similar product sold by SnoWizard under the mark CAJUN RED HOT®.

59.

The exclusive use in commerce of the trademark CAJUN RED HOT® for a period of nearly twenty-three years establishes that the mark has acquired distinctiveness pursuant to 15 U.S.C. §1052(f) and 37 C.F.R. §2.41.

60.

The fact that a competitor of SnoWizard admitted that SnoWizard exclusively used the mark CAJUN RED HOT® for approximately eleven years before the competitor began infringing it establishes that the mark has acquired distinctiveness pursuant to 15 U.S.C. §1052(f) and 37 C.F.R. §2.41.

61.

The fact that the product sold under the trademark CAJUN RED HOT® became so popular that a competitor intentionally adopted the mark in order to profit from the goodwill and notoriety that it generated irrefutably establishes that the mark has acquired

distinctiveness.

62.

Since at least May 1, 1986, SnoWizard has continuously and exclusively used the trademark WHITE CHOCOLATE & CHIPS® in Louisiana and in interstate commerce on and in connection with food flavoring concentrates manufactured by SnoWizard using a proprietary secret formula, and sold by SnoWizard to vendors of shaved ice confections and other confectioners.

63.

In addition, as a result of SnoWizard's continuous and exclusive use of the trademark WHITE CHOCOLATE & CHIPS® in connection with a food flavoring concentrate for shaved ice confections, the mark has acquired a high degree of distinctiveness and secondary meaning among vendors of shaved ice confections and other confectioners, who associate the mark with the corresponding food flavoring concentrate manufactured by SnoWizard.

64.

The trademark WHITE CHOCOLATE & CHIPS® represents a substantial investment of time, money and goodwill by SnoWizard.

65.

SnoWizard owns a protectable proprietary interest in the trademark WHITE CHOCOLATE & CHIPS®.

66.

SnoWizard has the exclusive rights to use and exclude others from using the trademark WHITE CHOCOLATE & CHIPS® in the State of Louisiana and in interstate commerce on and in connection with food flavorings.

67.

In the consolidated cases, SnoWizard developed evidence that clearly established that WHITE CHOCOLATE & CHIPS®, even if deemed to be merely descriptive, had acquired secondary meaning and is, therefore, a protectable and registerable trademark belonging to SnoWizard.

68.

Specifically, the evidence was obtained from Southern Snow's President, Milton Wendling, who admitted in deposition testimony that he copied SnoWizard's trademark WHITE CHOCOLATE & CHIPS® a few years ago.

69.

The competitor's intentional copying of Plaintiff's trademark is strong evidence of secondary meaning.

70.

The exclusive use in commerce of the trademark WHITE CHOCOLATE & CHIPS® for a period of nearly thirty-five years establishes that the mark has acquired

distinctiveness pursuant to 15 U.S.C. §1052(f) and 37 C.F.R. §2.41.

WHEREFORE, Plaintiff, SnoWizard, Inc., respectfully prays for judgment in its favor and against Defendant, Snow Ball's Chance, Ltd. as follows:

1) declaring that SnoWizard, Inc. continues to own a valid and enforceable federally registered trademark in "CAJUN RED HOT®" and "WHITE CHOCOLATE & CHIPS®, as the court and jury in the consolidated cases previously determined;

2) that Defendant is barred by the doctrine of *res judicata* from attacking the validity of the registered trademarks CAJUN RED HOT® and WHITE CHOCOLATE & CHIPS®;

3) ordering the Trademark Trial and Appeal Board to dismiss pending cancellation proceeding nos. 92060914 and 92060915 filed by Defendant;

4) attorneys' fees, costs, expenses, interest and any further relief as the Court deems just or equitable under the circumstances.

RESPECTFULLY SUBMITTED,

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