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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 tolar@tolarlawoffice.com
Submission	Answer
Filer's Name	Kenneth L Tolar
Filer's e-mail	tolar@tolarlawoffice.com
Signature	/kenneth l. tolar/
Date	05/09/2016
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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 ESTTA
Assistant Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

ANSWER TO PETITION FOR CANCELLATION

Defendant, SnoWizard, Inc. (hereinafter "SnoWizard" or "Defendant") hereby answers the Petition for Cancellation filed by Snow Ball's Chance, Ltd (hereinafter "Snow Ball's Chance" or "Petitioner"), as follows:

1. Paragraph 1 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 1 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoballs, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard admits that snoballs are produced by pouring flavored syrup over shaved ice. Any remaining allegations are denied.

2. Paragraph 2 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 2 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 2.

3. Paragraph 3 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 3 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 3.

4. Paragraph 4 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 4 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 4.

5. Paragraph 5 contains no allegations directed to SnoWizard and, therefore,

requires no answer. The assertions of paragraph 5 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 5.

6. Paragraph 6 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 6 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 6.

7. Paragraph 7 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 7 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 7.

8. Paragraph 8 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 8 are replete with presuppositions,

assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 8.

9. Paragraph 9 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 9 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 9.

10. Paragraph 10 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 10 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 10.

11. Paragraph 11 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 11 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions

about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 11.

12. Paragraph 12 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 12 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 12.

13. Paragraph 13 contains no allegations directed to SnoWizard and, therefore, requires no answer. The assertions of paragraph 13 are replete with presuppositions, assumptions, narrations and unsupported factual conclusions about snoball vendors and their customers, which neither Petitioner nor Defendant could possibly substantiate. To the extent a response is deemed necessary, SnoWizard denies the allegations of paragraph 13.

14. The allegations of paragraph 14 are denied for lack of information or knowledge sufficient to justify a belief therein.

15. The allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 are denied as written. Defendant does

not understand the meaning of "alternative manufacturer-suppliers."

17. The allegations of paragraph 17 are denied for lack of information or knowledge sufficient to justify a belief therein.

18. The allegations of paragraph 18 are denied for lack of information or knowledge sufficient to justify a belief therein.

19. The allegations of paragraph 19 are denied.

20. The allegations of paragraph 20 are denied as written. The concentrate offered under the trademark WHITE CHOCOLATE & CHIPS® has been a popular snoball flavor offered exclusively by SnoWizard since May 1, 1986. The only other known use of the trademark WHITE CHOCOLATE & CHIPS® has been due to unlawful trademark infringement by Southern Snow Manufacturing, Inc., Snow Ingredients, Inc. and their proxies, as evidenced by a final judgment rendered in E.D. La. Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449.

21. The allegations of paragraph 21 are denied as written.

22. Defendant admits that the concentrate offered under the trademark WHITE CHOCOLATE & CHIPS® has been a popular snoball flavor offered exclusively by SnoWizard since May 1, 1986. Defendant further admits that Southern Snow Manufacturing, Inc., Snow Ingredients, Inc. and/or their proxies intentionally infringed Defendant's trademark rights in WHITE CHOCOLATE &

CHIPS®, as evidenced by a final judgment of trademark infringement rendered in E.D. La. Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449. However, the only known infringing use by such parties coincided with their attempt to copy and simultaneously invalidate SnoWizard's valid and enforceable trademark. The remaining allegations of paragraph 22 are denied.

23. Defendant admits that Southern Snow Manufacturing, Inc., Snow Ingredients, Inc. and/or their proxies intentionally infringed Defendant's trademark rights in WHITE CHOCOLATE & CHIPS®, as evidenced by a final judgment of trademark infringement rendered in E.D. La. Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449. However, the use by such parties coincided with their attempt to copy and simultaneously invalidate SnoWizard's valid and enforceable trademark. The remaining allegations of paragraph 23 are denied.

24. Defendant admits that no other party was entitled to assert trademark rights to WHITE CHOCOLATE & CHIPS® other than SnoWizard. The remaining allegations of paragraph 24 are denied.

25. Defendant admits that in 2005 it notified Southern Snow that any use of SnoWizard's protected trademark WHITE CHOCOLATE & CHIPS® would constitute trademark infringement. However, any written communication to Southern Snow regarding the use of WHITE CHOCOLATE & CHIPS® is the best

evidence of its contents. All other allegations of paragraph 25 are denied.

26. Defendant admits that it filed a counterclaim when Southern Snow Manufacturing, Inc., Snow Ingredients, Inc. and/or their proxies infringed Defendant's trademark rights in WHITE CHOCOLATE & CHIPS®, as evidenced by a final judgment of trademark infringement rendered in E.D. La. Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449. The remaining allegations of paragraph 26 are denied.

27. SnoWizard acknowledges that it filed a counterclaim against Southern Snow for its unlawful infringement of WHITE CHOCOLATE & CHIPS®. However, the pleading itself is the best evidence of its contents. The remaining allegations of paragraph 27 are denied.

28. Defendant admits that it filed a trademark application on May 12, 2008 for the mark WHITE CHOCOLATE & CHIPS®. However, the application is the best evidence of its content. All other allegations of paragraph 28 are denied.

29. The allegations of paragraph 29 are denied.

30. Defendant admits that it received an office action dated October 15, 2009 regarding WHITE CHOCOLATE & CHIPS®. However, the office action of record in the application is the best evidence of its content. All other allegations of paragraph 30 are denied.

31. SnoWizard admits that it filed a notice of appeal with the Trademark Trial and Appeal Board(TTAB) regarding the office action dated October 15, 2009. All other allegations of paragraph 31 are denied.

32. SnoWizard admits that the TTAB issued a ruling on February 17, 2011, which granted SnoWizard's request that the mark WHITE CHOCOLATE & CHIPS® be placed on the supplemental register. However, the judgment of record in the application is the best evidence of its content. The remaining allegations of paragraph 32 are denied.

33. Defendant admits that it filed a Complaint for Judicial Review regarding the decision rendered by the TTAB on October 15, 2009. However, the complaint of record is the best evidence of its content. All other allegations of paragraph 33 are denied.

34. Defendant admits that it filed an application for registration of WHITE CHOCOLATE & CHIPS® on June 12, 2012 and that such application matured into a registration. However, the application of record and the registration pursuant thereto are the best evidence of their content. All other allegations of paragraph 34 are denied.

35. Defendant admits that it filed the application for registration of WHITE CHOCOLATE & CHIPS® on November 15, 2011 while litigation was pending

due to Southern Snow's unlawful infringement of the trademark. All other allegations of paragraph 35 are denied.

36. Defendant admits that it filed a declaration in application no. 85/473205 pertaining to WHITE CHOCOLATE & CHIPS®. However, the declaration itself is the best evidence of its content. All other allegations of paragraph 36 are denied.

37. Defendant admits that it filed a declaration in application no. 85/473205 pertaining to WHITE CHOCOLATE & CHIPS®. However, the document itself is the best evidence of its content. All other allegations of paragraph 37 are denied.

38. Defendant admits that it filed a declaration and supporting evidence in application no. 85/473205 pertaining to WHITE CHOCOLATE & CHIPS®. However, the documents and the file wrapper of the application are the best evidence of their content. All other allegations of paragraph 38 are denied.

39. Defendant admits that it claimed acquired distinctiveness in application no. 85/473205 pertaining to WHITE CHOCOLATE & CHIPS®. However, the document itself and the file wrapper of the application are the best evidence of their content. All other allegations of paragraph 39 are denied.

40. The allegations of paragraph 40 are denied.

41. The allegations of paragraph 41 are denied.

42. The allegations of paragraph 42 are denied.

43. The allegations of paragraph 43 are denied for lack of information or knowledge sufficient to justify a belief therein. Furthermore, any current, future or past use of WHITE CHOCOLATE & CHIPS® by Petitioner would constitute infringement of Defendant's judicially validated, enforceable trademark, as indicated by the final judgments in E.D. La. Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449.

44. The allegations of paragraph 44 are denied for lack of information or knowledge sufficient to justify a belief therein.

45. The allegations of paragraph 45 are denied. Petitioner can easily purchase any similar flavorings other than "WHITE CHOCOLATE & CHIPS®" from other suppliers, or purchase the product sold under the trademark WHITE CHOCOLATE & CHIPS® from SnoWizard.

46. Defendant admits that if Petitioner wants to offer a product under SnoWizard's federally registered, judicially validated trademark WHITE CHOCOLATE & CHIPS®, it must purchase such product from SnoWizard to avoid infringing such trademark. All other allegations of paragraph 46 are denied.

47. The allegations of paragraph 47 are denied. Inconvenience is not a valid defense to trademark infringement or sufficient grounds for seeking cancellation of a registered trademark.

48. Defendant admits that if Petitioner wants to offer a product under the federally registered trademark WHITE CHOCOLATE & CHIPS®, it must purchase the product from SnoWizard to avoid infringing such trademark. Otherwise, it is free to purchase any similar flavorings other than "White Chocolate & Chips" from other suppliers. All other allegations of paragraph 48 are denied.

49. The allegations of paragraph 49 are denied.

50. The allegations of paragraph 50 are denied.

51. The allegations of paragraph 51 are denied.

52. The allegations of paragraph 52 are denied.

Affirmative Defenses

I.

The claims of Snow Ball's Chance are barred by *res judicata*, issue preclusion and claim preclusion in that Snow Ball's Chance is a mere proxy of Southern Snow, Snow Ingredients, and/or counsel for Southern Snow, Snow Ingredients and Snow Ball's Chance, Mark Andrews, and, therefore, is bound by the previous judgments in E.D. La. Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449.

II.

The petition fails to state a claim for which relief can be granted.

III.

SnoWizard has the exclusive rights to use and exclude others, including Snow Ball's Chance, from using the federally registered trademark WHITE CHOCOLATE & CHIPS® in commerce on or in connection with food flavorings and flavored concentrates for snoballs, snow cones and shaved ice confections.

III.

WHITE CHOCOLATE & CHIPS® is valid and enforceable for all of the same reasons it was found to be valid and enforceable in the prior litigation because Petitioner and its attorney, as with Southern Snow, Snow Ingredients, and their solicited proxies in the litigation, cannot produce any evidence whatsoever to the contrary.

IV.

Snow Ball's Chance has no right of action and no standing to assert any alleged claim under 15 U.S.C. § 1051 *et seq.*

IV.

Each of the alleged claims that Snow Ball's Chance attempts to set forth in the petition is groundless, brought in bad faith and brought solely for purposes of harassment, as clearly evidenced by the final judgment rendered in E.D. La.

Case No. 06-9170 c/w 09-3394, 10-0791, and 11-1449 in which WHITE CHOCOLATE & CHIPS® was deemed to be a valid, enforceable, federally registered trademark belonging to SnoWizard, after Petitioner's counsel asserted the identical legal theories presented herein.

WHEREFORE, Defendant, SnoWizard, Inc. respectfully requests that, upon due proceedings had, the Petition for Cancellation filed by Snow Ball's Chance, Ltd. be dismissed with prejudice.

Respectfully submitted,

/kennth l. tolar/
Kenneth L. Tolar, Registration No. 39860
Attorney for SnoWizard, Inc.
2908 Hessmer Avenue
Suite 2
Metairie, Louisiana 70002
(504) 780-9891
(504) 780-7741 facsimile
tolar@tolarlawoffice.com

and

/s/ jack e. morris
JACK E. MORRIS (La. Bar No. 22539)
Attorney for Defendant, SnoWizard, Inc.
4051 Veterans Boulevard
Suite 208
Metairie, Louisiana 70002
Telephone: (504) 454-2769
Facsimile: (504) 454-3855
Email: Jem@jemorrislaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been served electronically and by first class mail upon Snow Ball's Chance, Ltd., Petitioner herein, on this 9th day of May, 2016, through its counsel of record as follows:

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

/kennth l. tolar/
Kenneth L. Tolar