

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

In re App. Serial No. **78/247,326**  
Mark: COOL CAT PRODUCTS and Design  
Filed: May 8, 2003  
Class: 18  
Applicant: John D. Gullahorn  
Published in the *Official Gazette* at TM 433 on May 11, 2004

TTAB

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

Commissioner for Trademarks  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Arlington, VA 22313-1451

MOTION TO STRIKE TRIAL TESTIMONY

Pursuant to 37 C.F.R. § 2.123(b)(2); 37 C.F.R. § 2.123(e)(3); 37 C.F.R. § 2.124 and TBMP § 707.03(b)(2), the Opposer requests the Board for an order excluding the entire trial testimony of witness John D. Gullahorn and accompanying exhibits offered on May 26, 2005, for the following reasons:



1. The testimony of witness John D. Gullahorn was noticed as a deposition by oral testimony.
2. The testimony given by witness John D. Gullahorn was offered by examination on written questions.
3. The Applicant failed to provide proper notice, filing and service of written questions as required by TTAB procedural rules.
4. The Opposer noted its objections on the record.

#### BRIEF IN SUPPORT OF MOTION TO STRIKE

On May 19, 2005, the Applicant, John D. Gullahorn, served notice to Opposer that testimony would be taken by oral deposition of witnesses before a court reporter, Anchor Court Reporting of Pensacola, Florida, on Thursday, May 26. John D. Gullahorn and his wife, Dr. Jean R. Gullahorn, were designated as witnesses for Applicant. See Applicant's Notice of Deposition, **Exhibit A**.

At the beginning of Applicant's trial testimony, Mr. Gullahorn stated on the record that he was not represented by counsel. The witness, Dr. Jean R. Gullahorn, then proceeded to read questions from a list written questions to Mr. Gullahorn. The Opposer stated its objection on the record, noting that the taking of Mr. Gullahorn's testimony by Dr. Gullahorn was improper since she was not a licensed attorney and

could not serve as counsel to John D. Gullahorn. Dr. Gullahorn stated for the record that she was appearing as a witness and was not a licensed attorney, and conceded that she could not act as Mr. Gullahorn's attorney.

The witness, John D. Gullahorn, then proceeded to read the written questions to himself, in the presence of witness Dr. Jean R. Gullahorn. Opposer's counsel objected on the record to the offering of Mr. Gullahorn's testimony in the presence of other witnesses, and invoked Federal Rules of Evidence Rule 615, exclusion of witnesses.

The court reporter indicated that the witness Dr. Jean R. Gullahorn was sequestered. Mr. Gullahorn then proceeded again to read the written questions to himself. Opposer stated its objection to the taking of Mr. Gullahorn's testimony by propounding written questions, which were not properly noticed and served. Mr. Gullahorn requested Opposer's counsel to waive the objection, which the Opposer refused.

The Applicant then indicated that he would proceed anyway with offering testimony by reading and answering the written questions. The Opposer requested the court reporter to note its standing objection to offering the testimony of witness John D. Gullahorn by way of written questions.

A party proposing to take a deposition on written questions must file and serve notice of the proposed deposition within 10 days of the opening of its testimony period. A copy of the questions to be answered by the witness must accompany the copy of the notice served on the adverse party. See Trademark Rule 2.124(b), 37 C.F.R. §2.124(b). A party receiving notice that an adverse party wishes to take a deposition on written questions has 20 days from the date of service of the notice to serve cross questions. See Trademark Rule 2.124(d)(1), 37 C.F.R. § 2.124(d)(1).

The Applicant failed to file notice to the Board of the proposed deposition by written questions and failed to serve notice and a copy of the proposed written questions to the Opposer.

The Trademark Rules include very detailed provisions governing the taking of depositions on written questions, and differentiate the taking of such a deposition for testimony purposes. In particular, Trademark Rule 2.124 governs the taking of a testimonial deposition on written questions in a Board proceeding

The Applicant's deposition was of its own witness, noticed as a testimony deposition on oral examination, but conducted as a deposition on written questions in the face of Opposer's standing objection. Proper notice with filing and service of written questions as required by TTAB procedural rules was not performed.

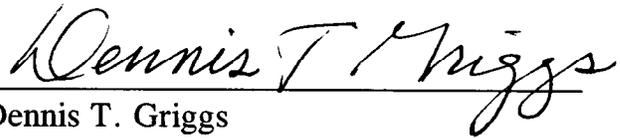
The Board has on more than one occasion made it clear that evidence not properly introduced will not be considered. See TBMP Section 706 and 37 C.F.R. § 2.123(l).

Therefore, the Opposer respectfully requests the Board for an order excluding the entire trial testimony of John D. Gullahorn, and the accompanying exhibits.

PERFECT FOODS, INC.

Date: June 3, 2005

By:



Dennis T. Griggs  
Attorney for Opposer

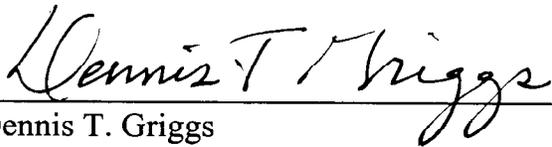
Griggs Bergen LLP  
17950 Preston Road, Suite 1000  
Dallas, Texas 75252  
(972) 447-4569

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing MOTION TO STRIKE TRIAL TESTIMONY has been deposited with the U.S. Postal Service this 3rd day of June 2005, as first class mail, postage prepaid and addressed to:

John D. Gullahorn  
4111 Calico Drive  
Cantonment, Florida 32533

Angela Garcia-McSweeney, Esq.  
Benjamin Ostrer & Associates, P.C.  
111 Main Street, P.O. Box 509  
Chester, New York 10918

By:   
Dennis T. Griggs  
Attorney for Opposer

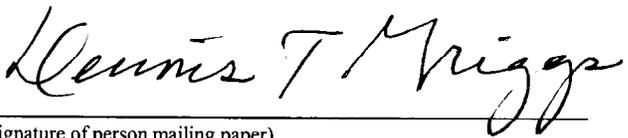
CERTIFICATE OF MAILING (37 C.F.R. §1.8a)

I hereby certify that this MOTION TO STRIKE TRIAL TESTIMONY (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Trademark Trial and Appeal Board, P.O. Box 1451, Arlington, VA 22313-1451.

Dennis T. Griggs

(Typed name of person mailing paper)

Date: June 3, 2005



(Signature of person mailing paper)

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

**PERFECT FOODS, INC.**

**Opposer**

v.

**JOHN D. GULLAHORN**

**Applicant**

**Opposition No. 91160978**

In re App. Serial N. 78/247,326  
Mark: Cool Cat Products and Design  
Filed: May 8, 2003  
Class: 18  
Applicant John D. Gullahorn  
Published in the OFFICAL GAZETTE at TM 433 on May 11, 2004

**NOTICE OF DEPOSITION**

To: Dennis T. Griggs  
Griggs Bergen LLP  
17950 Preston Road, Suite 1000  
Dallas, Texas 75252

Angela Garcia-McSweeney  
Benjamin Ostrer & Associates, PC  
111 Main Street, P.O. Box 509  
Chester, New York 10918

Please take notice that John D. Gullahorn dba COOL CAT PRODUCTS will take in the above-entitled action, for use as authorized by the Federal Rules of Civil Procedure and the Trademark Rules of Practice, the deposition by oral examination of

**OPPOSER'S EXHIBIT**

**A**

1. John D. Gullahorn  
Co-owner, Cool Cat Products  
4111 Calico Dr.  
Cantonment, FL 32533

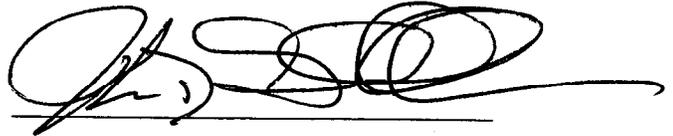
2. Jean R. Gullahorn, DVM  
Co-owner, Cool Cat Products  
4111 Calico Dr.  
Cantonment, FL 32533

witnesses for John D. Gullahorn dba COOL CAT PRODUCTS at 9:00 a.m. on May 26, 2005, and thereafter from day-to-day until the taking of depositions may be adjourned, at Anchor Court Reporting, 127 W. Intendencia Street, Pensacola, Florida 32502.

The deponents are hereby notified to appear and take part in the examination as may be advised and as shall be fit and proper.

You are cordially invited to attend and cross-examine.

COOL CAT PRODUCTS



John D. Gullahorn

Date: May 16, 2005

**RECEIVED**

MAY 18 2005

**DENNIS GRIGGS**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF DEPOSITION**

was served on the attorney for the Opposer and to co-counsel by First Class Mail on Monday, May 16, 2005.

Addressed to:

Dennis T. Griggs  
Griggs Bergen LLP  
17950 Preston Road, Suite 1000  
Dallas, Texas 75252

Angela Garcia-McSweeney  
Benjamin Ostrer & Associates, PC  
111 Main Street, P.O. Box 509  
Chester, New York 10918

  
\_\_\_\_\_  
John D. Gullahorn  
Applicant

**RECEIVED**

MAY 18 2005

**DENNIS GRIGGS**