

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

PERFECT FOODS, INC.

Opposer,

v.

JOHN D. GULLAHORN
ApplicantIn the matter of
Trademark Application
Serial No. 78/247326
For the mark: COOL CAT PRODUCTS
and design
International Class 18

Opposition No.: 91,160,978

APPLICANT'S REPLY IN SUPPORT
OF MOTION TO WITHDRAW OR
AMEND AND MOTION TO STRIKE
OPPOSER'S NOTICE OF RELIANCE
IN REBUTTAL**APPLICANT'S REPLY IN SUPPORT OF MOTION TO WITHDRAW OR
AMEND AND MOTION TO STRIKE OPPOSER'S NOTICE OF RELIANCE IN
REBUTTAL**

This Reply Brief is submitted in response to Opposer's Opposition to Applicant's Motions to Withdraw or Amend or Strike ("Opposer's Opposition"). In accordance with Trademark Rule §2.127(a), this Reply Brief is necessary as Opposer's Opposition Motion has raised new issues and mischaracterizes Applicant's position.

I. ACTIONS BY THE PARTIES**Applicant Has Acted in Good Faith**

Opposer has attacked Applicant's good faith by claiming Applicant has engaged in inconsistent positions. Not only is Opposer's claim false, Opposer is the party that has exhibited bad faith in engaging in inconsistent positions.



08-31-2005

Opposer claims that Applicant has inconsistent positions because Applicant states that he did not have the assistance of legal representation to respond to Opposer's Discovery Requests, yet Applicant was represented on the date that Opposer served its Discovery Requests. Applicant has not presented inconsistent positions. As stated in Applicant's Motion to Withdraw or Amend and Motion to Strike Opposer's Notice of Reliance in Rebuttal ("Applicant's Motion"), the destruction of Applicant's storage building severely hampered Applicant's ability to gather the required documentation on or before December 16, 2004 to enable anyone to respond to the Discovery Requests. [Gullahorn Affidavit] This included the Admission Requests as the Admission Requests referenced Applicant's document production and required derived information from such documentation. [See Applicant's Motion, Exhibit D; Exhibit A]. Prior to December 16, 2004, Applicant's Counsel was unable to work on or respond to the Discovery Requests without such documentation. [Gullahorn Affidavit] On December 16, 2004 Applicant was forced to make the financial decision to forego legal counsel. [Gullahorn Affidavit] Applicant thereafter exhibited good faith and resolve to provide responses to the Discovery Requests within thirteen days of the original due date without the assistance of legal counsel. [See Applicant's Motion, Exhibit D] [Gullahorn Affidavit].

Opposer Has Acted in Bad Faith

In contrast, Opposer has been the offender of its own allegation by engaging in inconsistent positions. In Opposer's Opposition, in bad faith Opposer attacks Applicant's former counsel by alleging that Applicant's former counsel did not properly withdraw from this proceeding and continues to represent Applicant. Prior to Opposer's Opposition, Opposer acknowledged that Applicant had revoked Applicant's Authority and was proceeding pro se.

Applicant provided Opposer's Counsel and the Board with notice of Revocation of Applicant's Counsel pursuant to 37 CFR § 2.1. The Board and Opposer's counsel were initially notified in writing on December 30, 2004 that Applicant was no longer represented by counsel. [Applicant's Motion Exhibit B]. The Board in its Order dated May 25, 2005, stated that "As a preliminary matter, the Board notes that applicant indicated in a December 30, 2004 filing with the Board that he and his wife are handling this case." [See Exhibit B]. Opposer's first statement in its brief in support of its Motion For Opposer to Attend Deposition By Telephone dated May 25, 2005 is, "The Applicant is proceeding pro se." [Exhibit C] Clearly Opposer has engaged in inconsistent positions to suit his case. Opposer's counsel previously acknowledged the express revocation of Applicant's formal counsel only to subsequently deny such acknowledgment as well as the Board's order to allege that Applicant is still represented by counsel. Opposer is simply trying to manipulate the Applicant, the Board, and the truth rather than relying on the merits of the case.

Opposer's inconsistent positioning works to his detriment. Given Opposer's stated position that Applicant's former counsel did not properly withdraw from the case and is still Applicant's counsel, Opposer's Notice of Reliance in Rebuttal should not even be considered by the Board. Pursuant to 37 CFR § 2.119 (b), service of papers must be on the attorney or other authorized representative of the party if there be such. Pursuant to 37 CFR §2.119(a), proof of such service must be made before the paper will be considered by the Office. Under Opposer's position, Opposer failed to serve Applicant's Counsel with Opposer's Notice of Reliance in Rebuttal. Thus pursuant to Opposer's position, the Motion before the Board is moot as Opposer's Notice of Reliance in Rebuttal should not even be considered. In addition, under Opposer's argument, Opposer failed to provide proper service of process to Applicant's alleged counsel for (1) Opposer's Motion for Opposer to Attend Deposition By

Telephone and (2) Opposer's Motion to Strike Trial Testimony [See Exhibit D] by failing to provide service to Applicant's counsel.

Opposer Failed to Communicate with Applicant

Contrary to Opposer's assertions, Applicant's Counsel never received a request from Opposer's Counsel or anyone on behalf of Opposer or Opposer's Counsel for Applicant to provide a settlement proposal in writing. [Cheryl Meide Affidavit] Opposer's Counsel never responded to Applicant's repeated efforts to contact Opposer's Counsel to discuss settlement and an extension of time to respond to Opposer's Discovery Requests, including Admission Requests. [Cheryl Meide Affidavit; Applicant's Motion Exhibit A].

II. APPLICANT'S ACTUAL ADMISSION RESPONSES SHOULD BE ACCEPTED

No Prejudice to Opposer Exists

Applicant stated in Applicant's Motion that Opposer never returned Applicant's four separate phone calls and messages regarding settlement and a resultant extension of time to respond to Opposer's discovery requests. In response, Opposer states in Opposer's Opposition that "Applicant could have made a timely request for a stipulated or consented motion for relief, but did not." Applicant never did receive a verbal or written response from Opposer. However, as Opposer states that it would have considered settlement and consented to additional time for Applicant to respond to Opposer's outstanding discovery requests, Applicant's submission of his Admission responses on December 30, 2004 could not have prejudiced Opposer. Such statements by Opposer also refute Opposer's correspondence dated December 30, 2004 deeming such admissions admitted as such

correspondence was received only after Applicant provided Opposer with its discovery responses.

Opposer has failed to show any prejudice to Opposer by receiving Applicant's responses to the Admission Requests less than two weeks after the original deadline. Opposer claims prejudice by being precluded from offering testimony on allegedly newly contested matters. However Opposer did offer testimony on such contested matters during Opposer's Testimony Period. Opposer alleges that Applicant failed to seek relief against the "deemed admissions" at a time when contested matters and allegations could have been explored and tested under oath. As Opposer requested Applicant's admission responses after declaring the "deemed admissions," Applicant was misled to believe that Opposer's request and fulfillment of such request would eliminate any alleged "deemed admissions." [Applicant's Motion Exhibit C].

Opposer stresses that Applicant failed to file a request to withdraw or amend the admissions prior to the close of Opposer's Rebuttal Testimony and Applicant waited 229 days to file Applicant's Motion. In reality, no prejudice against Opposer exists. Opposer was fully aware as of December 30, 2004 that Applicant intended to rely upon its responses to Opposer's Admission Requests. Yet Opposer did not Notice the "deemed admissions" during Opposer's Testimony Period. If Opposer was relying on the "deemed admissions," Opposer would have Noticed the "deemed admissions" during Opposer's Testimony Period. If the adverse party has not responded to the requests for admission, the party relying on its adversary's response should make of record the requests for admission together with a statement that the adverse party did not respond to the admission requests. BASF Wyandotte Corp. v. Polychrome Corp., 586 F2d 238 (CCPA 1978). Notice of the "deemed admissions"

during Opposer's Testimony Period would have brought any issue with regard to the "deemed admissions" to light; something which Opposer wanted to avoid.

Opposer's "deemed admissions" were served via U.S. mail with only four days remaining in Opposer's Rebuttal Testimony [Exhibit E] to foreclose Applicant's ability to act on any such alleged deficiency. Applicant has made recent great strides to educate himself on the rules and procedures of the Trademark Trial and Appeal Board as a pro se Applicant. It is now apparent that, rather than Opposer being prejudiced by the thirteen-day delay of Applicant's Admission responses, in reality, Opposer has attempted to take advantage of and prejudice Applicant by twisting technicalities to foreclose Applicant's ability to defend its case on the merits.

Finally, Opposer's allegation that the September 20, 2005 due date for Opposer's trial brief further prejudices Opposer was rendered moot as the Board suspended proceedings on August 19, 2005. To the extent the Board determines that additional time is appropriate to allow the exploration, examination, or testimony of any contested matters or allegations, Applicant is not opposed to the grant of such additional time.

Applicant's Conduct Constitutes Excusable Neglect

Contrary to Opposer's claims that Applicant has not proven excusable neglect, Applicant has shown existence of events beyond his control that impeded his ability to provide a timely response to Opposer's Discovery Requests. [Gullahorn Affidavit] Such events resulted in a thirteen-day delay and excusable neglect. Indeed, such events prevented Applicant from engaging in his own discovery of Opposer. [Gullahorn Affidavit]

Opposer claims that the devastating effect of Hurricane Ivan on Applicant, which, among other things, left Applicant and his family emotionally devastated, Applicant's home

and car severely damaged, and Applicant's storage building totally destroyed that contained necessary documents to complete Opposer's Discovery Requests, is not a credible interference.¹ Opposer makes this claim by mischaracterizing Applicant's other additional uncontrollable events as if they were optional and/or events that should not receive any priority. Opposer's allegation is callous.

Applicant's oldest son required constant supervision during the holiday months while home on Christmas vacation. [Gullahorn Affidavit] Opposer has attempted to mischaracterize this additional time constraint as Applicant taking a vacation. Contrary to Opposer's assumption, Applicant and his wife have not taken a vacation in over five years and have only taken one vacation in the last fifteen years. [Gullahorn Affidavit]

Opposer claims that because Applicant opened a new business venture and fulfilled his obligations in the annual non-profit CFA Cat Show after Hurricane Ivan hit, the effects of Hurricane Ivan are not credible. The opening of Applicant's new business venture was the result of months of preparation and financial sacrifice. [Gullahorn Affidavit] Applicant could not have financially afforded **not** to open the new business venture. Sunk costs precluded any option to forego such opening. [Gullahorn Affidavit]

Similarly, the CFA Cat Show and the obligations that befell Applicant in connection with such show were planned years in advance. [Gullahorn Affidavit] Because of the responsibilities that befell Applicant and Applicant's wife, it would have been more onerous

¹ Currently, Applicant is still trying to recover from damage sustained from Hurricane Ivan and subsequently Hurricane Dennis. At the time of the drafting of this Reply Motion, Applicant is simultaneously preparing his family, home, and office for the onslaught of Hurricane Katrina. Hurricane Katrina is forecasted to be a major hurricane and a possible direct hit when it reaches Applicant in approximately two days.

and interfering had they abandoned the CFA Cat Show and dealt with multiple breaches of obligations to exhibitors, vendors, spectators, and the Cat Club itself. [Gullahorn Affidavit]

Opposer mischaracterizes the effect on Applicant of the inability to change national holidays and family events as Applicant enjoying holiday activities and celebrations. The timing of such holidays and family events took an additional emotional and physical toll on Applicant. [Gullahorn Affidavit] Applicant has a now five-year old adopted daughter that needs to feel special by acknowledging her adoption anniversary and a seven-year old adopted “special needs” child that needs to feel special on his birthday. [Gullahorn Affidavit] These children cannot understand, and should not be asked to understand, the burdens of the outside world on their parents on their special day and during the holidays during which they give thanks and blessings. [Gullahorn Affidavit] Opposer claims that Applicant has exhibited inexcusable neglect as these events are “discretionary” and Applicant does not have control over his “priorities.” Applicant submits that any healthy compassionate person could not consider such events “discretionary” or subject to “prioritizing.”

The Interests of Justice are Served by Amending the Admission Responses

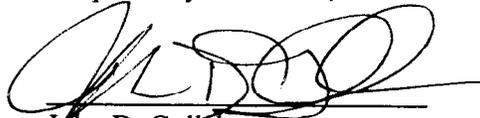
Applicant’s responses to the Admission Requests should be as set forth in Applicant’s formal response as, presentation of the merits of the action will be subserved thereby. Opposer focuses on Applicant’s right to establish his constructive priority date to downplay the devastating effect of the “deemed admissions” on the interests of justice in this case. Opposer readily admits that if the “deemed admissions” are allowed to stand, Applicant will have effectively conceded the common law priority issues. In effect, such common law priority issues are the crux of the case at hand.

Opposer's focus on Applicant's essentially irrelevant constructive priority date is misleading. Opposer alleges that Applicant will not be prejudiced by conceding common law priority issues because Applicant has the right to rely on his constructive priority date. Applicant has strong evidence of common law priority that substantially precedes not only Applicant's constructive priority date, but Opposer's stated dates of first use. [Gullahorn Affidavit] If Applicant is left only with his constructive priority date through deemed admissions, Opposer has effectively eliminated all of Applicant's evidence and testimony of priority over Opposer's mark, and essentially Applicant's case.

Conclusion

Because Applicant's response to Opposer's Admission Requests thirteen days after the due date constitutes excusable neglect and Opposer has not been prejudiced by any delay in Applicant's response, Applicant's Motion should be granted. Applicant also respectfully requests that the Board issue any other order deemed appropriate.

Respectfully submitted,



John D. Gullahorn,
dba Cool Cat Products
Applicant

August 27, 2005

Cool Cat Products
4111 Calico Drive
Cantonment, FL 32533
(850) 478-CATS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Applicant's Reply in Support of Motion to Withdraw or Amend and Motion to Strike Opposer's Notice of Reliance in Rebuttal was deposited with the ~~United States Postal Service as priority mail~~ ^{FEDEX 2 DAY}, postage prepaid, in an envelope addressed to Dennis Griggs, Griggs Bergen LLP, 17950 Preston Road, Suite 1000, Dallas, Texas 75252, on the date set forth below.

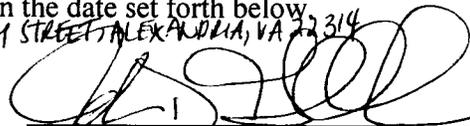


August 27, 2005

John D. Gullahorn,
dba Cool Cat Products
Applicant, Cool Cat Products
4111 Calico Drive
Cantonment, FL 32533
(850) 478-CATS

CERTIFICATE OF MAILING

I hereby certify that this Applicant's Reply in Support of Motion to Withdraw or Amend and Motion to Strike Opposer's Notice of Reliance in Rebuttal is being deposited with the ~~United States Postal Service as priority mail~~ ^{FEDEX 2 DAY}, postage prepaid, in an envelope addressed to: Trademark Trial and Appeal Board, United States Patent and Trademark Office, P.O. ~~Box 1451, Alexandria, VA 22313-1451~~ ^{MADISON EAST, CONCOURSE LEVEL ROOM C55, 600 DULANY STREET ALEXANDRIA, VA 22314} on the date set forth below.



August 27, 2005

John D. Gullahorn,
dba Cool Cat Products
Applicant, Cool Cat Products
4111 Calico Drive
Cantonment, FL 32533
(850) 478-CATS

GULLAHORN AFFIDAVIT

**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

AFFIDAVIT

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

-----X

STATE OF FLORIDA)
) SS:
COUNTY OF ESCAMBIA)

JOHN D. GULLAHORN, being duly sworn, deposes and says:

On September 16, 2004, Hurricane Ivan hit Cantonment, Florida in the panhandle and resulted in a 24-hour curfew, widespread devastation, and Marshall law for one week after the Hurricane hit;

Hurricane Ivan left me and my family emotionally devastated, without telephone communications for nearly 6 weeks, with no water for 9 days, with no power for 13 days, with my home and car severely damaged, with 60-80 downed trees at my home and office locations, and with a storage building that I own totally destroyed by a fallen tree. Such storage building contained documentation required to respond to Discovery Requests served by Opposer in this proceeding;

Neither I nor anyone on my behalf including Applicant's Counsel could properly respond to the Discovery Requests served by Opposer on Applicant in this proceeding before access and recovery of salvageable documents from such storage building was possible;

Such access and recovery of salvageable documentation from such storage building occurred after December 16, 2004;

On December 16, 2004 Applicant was forced to make the financial decision to forego legal counsel in this proceeding;

Once required documentation was able to be salvaged after December 16, 2004, I diligently worked under difficult conditions to respond to Opposer's Discovery Requests and provided responses to such Discovery Requests without the aid of legal counsel on December 30, 2004;

The amount of time it took for me to respond to Opposer's Discovery Requests was overwhelming without the aid of legal counsel in this proceeding;

The timing of the 2004 Thanksgiving and Christmas holidays and family events took an additional emotional and physical toll on Applicant;

In December 2004, my son required additional supervision during the holiday months as he returned home for Christmas vacation;

My wife, who is co-owner of Cool Cat Products and a full time Veterinarian, and I have not taken a vacation in over five years and have only taken one vacation in the last fifteen years;

I was forced to follow through with opening a new business venture on November 1, 2004 because of preparation, sunk costs, and financial obligations that were incurred over many months prior to November 1, 2004;

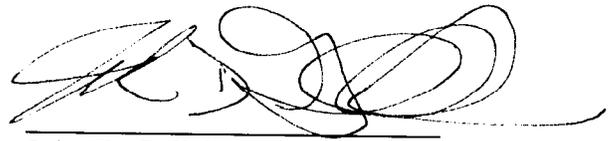
My wife and I were obligated as the show manager, club president, club secretary/treasurer, and show secretary/treasurer to hold the annual non-profit CFA Cat Show on November 13 – 14, 2004, which was scheduled years in advance of its show date. Because of the responsibilities that befell my wife and I in connection with such show, the effect of abandoning our obligations for the CFA Cat Show would have been more onerous and interfering with multiple breaches of obligations to exhibitors, vendors, spectators, and the Cat Club itself rather than actually holding such show;

My wife and I have a now five-year old adopted daughter with an adoption anniversary on December 11, 20004;

My wife and I have a seven-year old adopted "special needs" child who had his seventh birthday on November 24, 2004; and

Because of the events that took place as described in this Affidavit, I was unable to engage in the discovery of Opposer during the discovery period in these proceedings;

I believe strongly that I have presented strong evidence of common law priority in this proceeding that substantially precedes not only Applicant's constructive priority date, but Opposer's stated dates of first use.



John D. Gullahorn

Sworn to before me this 27th day of August, 2005



Solomon Martin Abernethy
Notary Public - State of Florida
Commission No. DD306367
My commission Expires Apr. 4, 2008

CHERYL MEIDE AFFIDAVIT

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

AFFIDAVIT

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

STATE OF FLORIDA)
) SS:
COUNTY OF DUVAL)

CHERYL DAWN MEIDE, ESQUIRE, being duly sworn, deposes and says:

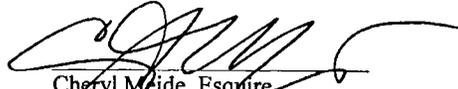
On behalf of Applicant, I received Opposer's Interrogatories, Opposer's Request for Production of Documents and Things to Applicant, and Opposer's Request for Admissions No. 1-10 to Applicant on November 16, 2004 via U.S. Mail ("Discovery Requests");

After receiving such Discovery Requests, I conferred with Applicant and subsequently attempted to contact Opposer's Counsel via telephone on December 8, 2004; December 10, 2004; December 13, 2004; and December 14, 2004;

I left detailed voice messages for Opposer's Counsel on each of the four attempts to contact Opposer's Counsel via telephone requesting to discuss settlement and a resultant extension of time to respond to Opposer's discovery requests and requested that Opposer's Counsel provide a return phone call;

To date, I never received a request from Opposer's Counsel or any person on behalf of Opposer or Opposer's Counsel that Applicant submit a settlement proposal in writing;

To date, neither Opposer's Counsel nor anyone on behalf of Opposer or Opposer's Counsel ever responded to any of my voice messages and requests for a return phone call left with Opposer's Counsel.


Cheryl Meide, Esquire
Florida Bar No. 0064173

Sworn to before me this 26th day of August, 2005





EXHIBIT A

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 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

Commissioner for Trademarks
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, VA 22202-3514

Sir:

OPPOSER'S REQUESTS FOR ADMISSION NO. 1- 10 TO APPLICANT

Pursuant to 37 C.F.R. §2.120(h) and Rule 36(a) of the Federal Rules of Civil Procedure, Opposer hereby requests that Applicant admit the following. The instructions and definitions set forth in OPPOSER'S INTERROGATORIES NO. 1-23 TO APPLICANT served herewith will be applicable hereto and are incorporated herein by reference. If Applicant denies or objects to any of the requests below, it will state in detail the reasons for the denial or objection.

OPPOSER'S
REQUESTS FOR ADMISSION NO. 1-10

L1937.5324.4916

EXHIBIT A

COPY

ADMISSION REQUEST NO. 1

All documents produced by Applicant in response to Opposer's Interrogatories No. 1-23 and Requests for Production of Documents and Things No. 1-21 are authentic.

RESPONSE:

ADMISSION REQUEST NO. 2

All documents and responses served by Applicant in response to Opposer's Interrogatories No. 1-23, Requests for the Production of Documents and Things No. 1-21, and these Requests for Admissions No. 1- 10, may be relied on by either party during the testimony period.

RESPONSE:

ADMISSION REQUEST NO. 3

For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark as a trademark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address in the State of Florida.

RESPONSE:

ADMISSION REQUEST NO. 4

For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark as a trademark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address outside of the State of Florida.

RESPONSE:

ADMISSION REQUEST NO. 5

For each product identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address in the State of Florida prior to May 8, 2003.

RESPONSE:

ADMISSION REQUEST NO. 6

For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant did not use Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address outside of the State of Florida prior to May 8, 2003.

RESPONSE:

ADMISSION REQUEST NO. 7

For each product identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address in the State of Florida prior to January 1, 2002.

RESPONSE:

ADMISSION REQUEST NO. 8

For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant did not use Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address outside of the State of Florida prior to January 1, 2002.

RESPONSE:

ADMISSION REQUEST NO. 9

Admit that at the time Applicant filed U.S. Trademark Application Serial No. 78/247,326 Applicant was aware of the Opposer's mark and its wheatgrass product as set forth in Opposer's U.S. Trademark Application Serial No. 78/254,092..

RESPONSE:

ADMISSION REQUEST NO. 10

Admit that at the time Applicant filed U.S. Trademark Application Serial No. 78/247,326 Applicant was aware of the Opposer, Perfect Foods, Inc..

RESPONSE:

Respectfully submitted,

PERFECT FOODS, INC.
OPPOSER

Date: November 12, 2004

By: *Dennis T. Griggs*
Dennis T. Griggs
Attorney for Opposer

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing

OPPOSER'S REQUESTS FOR ADMISSION NO. 1-10

were served on the attorney for Applicant this 12th day of November 2004 by First Class
Mail addressed to:

Cheryl Meide, Esq.
Meide Law Firm, P.A.
6622 Southpoint Drive South, Suite 150
Jacksonville, Florida 32216

By:



Dennis T. Griggs
Attorney for Opposer

EXHIBIT B

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

Baxley

Faxed: May 25, 2005

Opposition No. 91160978

Perfect Foods, Inc.

v.

John D. Gullahorn

Andrew P. Baxley, Interlocutory Attorney:

At approximately 3:45 p.m. EDT on the afternoon of May 25, 2005, opposer's counsel contacted the Board attorney assigned to this case by telephone to inquire about Board procedure in connection with telephone depositions. In particular, opposer's counsel indicated that he sought to attend applicant's testimony deposition, which is scheduled to commence on May 26, 2005 at 9 a.m., by telephone, but that applicant would not consent to his so attending. The Board attorney stated that any request to so attend by telephone must be raised via a motion. See Fed. R. Civ. P. 30(b)(7). Opposer filed such motion at approximately 5:10 p.m. EDT on that afternoon.

Because of the time-sensitive nature of the motion at issue, the Board attorney determined that such motion should be decided by telephone conference. Such telephone

EXHIBIT B

Opposition No. 91160978

conference was held at 5:55 p.m. EDT on May 25, 2005 between opposer's counsel, Dennis Griggs, applicant, and the Board interlocutory attorney assigned to this case, Andrew Baxley.

As a preliminary matter, the Board notes that applicant indicated in a December 30, 2004 filing with the Board that he and his wife are handling this case. Applicant, however, admitted during the telephone conference that his wife is not an attorney. Accordingly, she may not represent applicant herein. See Trademark Rules 2.17 and 10.14(a)-(c) and (e); TBMP Sections 114.01 and 114.03 to 114.05 (2d ed. rev. 2004).

In support of opposer's motion, opposer contends that its counsel asked applicant on May 20, 2005 to consent to its counsel's appearance at applicant's testimony by deposition by telephone and that its counsel did not receive any indication that applicant did not so consent until he received a letter from applicant on the afternoon of May 25, 2005, i.e., the day before applicant's testimony deposition was scheduled to takeplace. Opposer further contends that federal court practice favors the use of telephone depositions and therefore asks that its attorney be allowed to attend applicant's testimony deposition by telephone.

In response, applicant contends that his wife, who will be reading questions to him during his deposition and who has been designated as a witness for applicant, is hearing

Opposition No. 91160978

impaired and that, accordingly, opposer's counsel's appearance at the deposition by telephone will be frustrating. Applicant further contends that opposer's counsel should have no difficulty attending applicant's testimony deposition in person.

A deposition may be taken or attended by telephone either by stipulation of the parties or upon motion granted by the Board. See Fed. R. Civ. P. 30(b)(7); and *Hewlett-Packard Co. v. Healthcare Personnel Inc.*, 21 USPQ2d 1552 (TTAB 1991). Current federal practice favors the use of technological benefits in order to promote flexibility, simplification of procedure, and reduction of cost to parties. See *Julia M. Bywaters v. Lloyd K. Bywaters*, 123 F.R.D. 175 (E.D.Pa. 1988). Nothing in the language of Rule 30(b)(7) requires a showing of necessity, financial inability, or other hardship to obtain an order to proceed via telephone, and leave to take and/or attend telephonic depositions should be liberally granted. See *Jahr v. IU International Corp.*, 4 Fed. R. Serv.3d 943 (M.D.N.C. 1986).

The Board notes that applicant is located in Cantonment, Florida, while opposer's counsel is located in Dallas, Texas.¹ Accordingly, attending applicant's testimony deposition by telephone will save opposer

¹ A review of the www.mapquest.com database indicates that a drive from Dallas, Texas to Pensacola, Florida, the site of applicant's testimony deposition, is approximately 650 miles.

Opposition No. 91160978

considerable time and expense. In addition, the Board notes that advances in telephony for the hearing impaired should be able to accommodate the hearing impairment of applicant's wife.² Based on the foregoing, the Board finds that applicant has not provided a sufficient reason to require opposer's counsel to attend applicant's testimony deposition in person.

In view thereof, opposer's motion for leave to attend applicant's testimony deposition by telephone is granted. Opposer's counsel may attend applicant's testimony deposition via telephone.³ If applicant's wife is deposed, the Board expects the parties to work together, including using appropriate equipment, to accommodate her hearing impairment.

Testimony periods remain as set.

² The Board notes that applicant's wife participated by telephone in scheduling the telephone conference in which the motion at issue in this order was decided.

³ The parties were informed of the Board's decision at the conclusion of the May 25, 2005 telephone conference. Because this decision has been sent by facsimile to the parties, a mailed copy will not follow.

FAX

TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA. 22313-1451
(571) 272-4250 office
(571) 273-0059 fax

DATE: *May 25, 2005*

TO: *Dennis GiggS (972-732-9218)*

FROM: *Andrew Buxley*

PAGES: *5*

SUBJECT: *Opposition 91160978*

*** TX REPORT ***

TRANSMISSION OK

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SUBADDRESS		
CONNECTION ID		
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RESULT	OK	

FAX

TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA. 22313-1451
 (571) 272-4250 office
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DATE: *May 25, 2005*

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PAGES: *5*

FAX

**TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA. 22313-1451
(571) 272-4250 office
(571) 273-0059 fax**

DATE: *May 25, 2005*

TO: *John D. Gullahorn (850-478-8355)*

FROM: *Andrew Baxley*

PAGES: *5*

SUBJECT: *Opposition No. 91160978*

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO	4988	
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CONNECTION ID		
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FAX

TRADEMARK TRIAL AND APPEAL BOARD
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451
(571) 272-4250 office
(571) 273-0059 fax

DATE: May 25, 2005

TO: John D. Gullakorn (850-478-8355)

FROM: Andrew Boxley

PAGES: 5

EXHIBIT C

Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>

ESTTA Tracking number: **ESTTA34014**

Filing date: **05/25/2005**

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

Proceeding	91160978
Party	Plaintiff PERFECT FOODS, INC
Correspondence Address	DENNIS T. GRIGGS GRIGGS BERGEN, LLP 17950 PRESTON ROAD, SUITE 1000 DALLAS, TX 75252
Submission	Motion to permit Opperser's counsel to attend Applicant's testimony deposition by telephone.
Filer's Name	Dennis t. Griggs
Filer's e-mail	dennis@griggslaw.com
Signature	/Dennis T. Griggs/
Date	05/25/2005
Attachments	executed.motion.052505.pdf (5 pages) stipulation.telephone.deposition.052005.pdf (4 pages) gullahorn.052005.letter.pdf (1 page) email.gullahorn.052005.pdf (1 page) gullahorn.fax.052505.pdf (1 page)

EXHIBIT C

**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.

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

Commissioner for Trademarks
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, VA 22202-3514

**MOTION FOR OPPOSER TO
ATTEND DEPOSITION BY TELEPHONE**

Pursuant to Federal Rules of Civil Procedure 30(b)(7), the Opposer requests the Board for an order permitting Opposer's counsel, Dennis T. Griggs, to appear, participate and attend by telephone the Applicant's testimony deposition that is presently scheduled at Anchor Court Reporting, 127 West Intendencia Street, Pensacola, Florida 32502 at 9 a.m.

on May 26, 2005.

BRIEF IN SUPPORT OF MOTION

The Applicant is proceeding pro se. Opposer has already taken its testimony and the Applicant noticed Opposer on May 19 that he is taking his testimony before a court reporter, Anchor Court Reporting of Pensacola, Florida, on Thursday, May 26, and his wife will be asking the questions. Mrs. Gullahorn has also been designated as a witness. After conferring with the Opposer, I called Mr. Gullahorn on May 20 to ask consent for my attendance by telephone, but his secretary said that he was not available and would return my call. We have requested but have not been notified of Mr. Gullahorn's fax number. Accordingly I sent him an email and letter on May 20 asking for his consent for me to participate by telephone. Thereafter I called repeatedly to discuss our request, but his secretary said that he was not available and would return my call. Mr. Gullahorn has not returned my call as of this date. Today, in this afternoon's mail, I received a letter from Mr. Gullahorn saying that he would not consent. His testimony is set for tomorrow morning at 9 a.m.

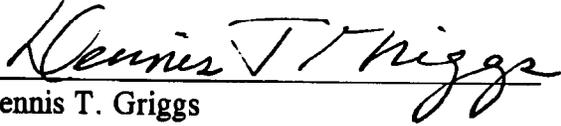
On stipulation by the parties, or on motion granted by the board, a deposition may be attended by telephone. *See Fed. R. Civ. P. 30(b)(7), and Hewlett-Packard Co. v. Healthcare Personnel Inc., 21 USPQ2d 1552, 1552-53 (TTAB 1991) (Board granted request to attend deposition by telephone noting that trademark rules do not specifically*

provide for or prohibit depositions by telephone and that federal court practice favors use of technological benefits).

Mr. Gullahorn's telephone number is 1-850-478-2287. The court reporter, Ms. Starr Wilkerson of Anchor Court Reporting, can be reached at 1-850-432-2511. Dennis Griggs, the undersigned attorney for Opposer, can be reached at 1-972-447-4569.

PERFECT FOODS, INC.

Date: May 25, 2005

By: 
Dennis T. Griggs
Attorney for Opposer

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

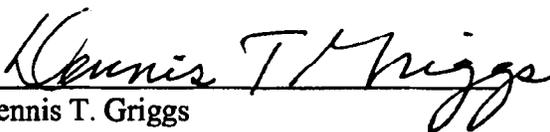
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing STIPULATION FOR OPPOSER TO ATTEND DEPOSITION BY TELEPHONE has been forwarded this 25th day of May 2005, by e-mail and first class mail, postage prepaid and addressed to:

by e-mail: Dan@DanGullahorn.com

by mail: John D. Gullahorn
4111 Calico Drive
Cantonment, Florida 32533

By:


Dennis T. Griggs

Attorney for Opposer

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this MOTION FOR OPPOSER TO ATTEND DEPOSITION BY TELEPHONE along with any paper referred to as being attached or enclosed) is being filed electronically on the date shown below to the Trademark Trial and Appeal Board, 2900 Crystal Drive, Arlington, VA 22202-3513.

Dennis T. Griggs

(Typed name of person transmitting paper)

Date: May 25, 2015

Dennis T. Griggs

(Signature of person transmitting paper)

**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

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

Commissioner for Trademarks
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, VA 22202-3514

**STIPULATION FOR OPPOSER TO
ATTEND DEPOSITION BY TELEPHONE**

Pursuant to Federal Rules of Civil Procedure 30(b)(7), the Opposer and Applicant stipulate that Opposer's counsel, Dennis T. Griggs, may appear, participate and attend by telephone the Applicant's testimony deposition that is presently scheduled at Anchor Court

Reporting, 127 West Intendencia Street, Pensacola, Florida 32502 at 9 a.m. on May 26, 2005.

PERFECT FOODS, INC.

Date: May 20, 2005

By: *Dennis T. Griggs*

Dennis T. Griggs
Attorney for Opposer
Griggs Bergen LLP
17950 Preston Road, Suite 1000
Dallas, Texas 75252
(972) 447-4569

JOHN D. GULLAHORN

Date: _____

By: _____

John D. Gullahorn
Applicant
4111 Calico Drive
Cantonment, FL 32533

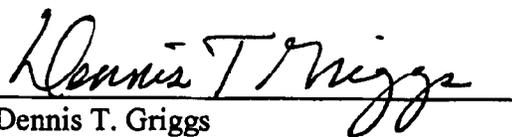
CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing STIPULATION FOR OPPOSER TO ATTEND DEPOSITION BY TELEPHONE has been forwarded this 20th day of May 2005, by e-mail and first class mail, postage prepaid and addressed to:

by e-mail: Dan@DanGullahorn.com

by mail: John D. Gullahorn
4111 Calico Drive
Cantonment, Florida 32533

By:


Dennis T. Griggs
Attorney for Opposer

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

I hereby certify that this STIPULATION FOR OPPOSER TO ATTEND DEPOSITION BY TELEPHONE 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, 2900 Crystal Drive, Arlington, VA 22202-3513.

S. Maria Tedesco
(Typed name of person mailing paper)

Date: _____

(Signature of person mailing paper)

GRIGGS BERGEN LLP

ATTORNEYS AT LAW

PRESTON ROAD AT FRANKFORD
PRESTON PLAZA, SUITE 1000
17950 PRESTON ROAD
DALLAS, TEXAS 75252 USA

Writer's Direct Dial
972-447-4569

PATENT, TRADEMARK
and COPYRIGHT matters

Main 972-732-1001
Fax 972-732-9218

Writer's email
dennis@griggslaw.com

May 20, 2005

VIA E-MAIL - CONFIRMATION BY FIRST CLASS

Mr. John D. Gullahorn
Cool Cat Products
4111 Calico Drive
Cantonment, FL 32533

Re: Notice of Deposition
Perfect Foods, Inc. v. John D. Gullahorn
Opposition No.1 91160978
Our File: L1932.5324.4916

Dear Mr. Gullahorn:

I have made arrangements with Anchor Court Reporting to attend your testimony deposition by telephone. A stipulation to that effect is enclosed for your signature. Please sign and date the stipulation and return it to me by facsimile. We will take care of filing this paper with the Trademark Trial and Appeal Board.

Please let us know if you are currently represented by counsel, or if you will be represented by counsel at your testimony deposition.

Very truly yours,



Dennis Griggs

DTG/smt
Enclosure
cc: Perfect Foods, Inc.

Dennis Griggs

From: Dennis Griggs [dennis@griggslaw.com]
Sent: Friday, May 20, 2005 2:49 PM
To: 'dan@dangullahorn.com'
Cc: MATSIL, IRA (matsil@slater-matsil.com)
Subject: Your Notice of Deposition
Importance: High

Dear Mr. Gullahorn:

I have made arrangements with Anchor Court Reporting to attend your testimony deposition by telephone. A stipulation to that effect is attached for your signature. Please sign and date the stipulation and return it to me by facsimile. We will take care of filing this paper with the Trademark Trial and Appeal Board.

If you are currently represented by counsel, or if you will be represented by counsel at your testimony deposition, please give us his/her contact information.

Also, please let us know your facsimile number.

Thank you.

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

+1 972-447-4569
+1 972-732-9218 Fax
dennis@griggslaw.com
www.griggslaw.com



John D. Gullahorn
Cool Cat Products
4111 Calico Drive
Cantonment, FL 32533
850-478-CATS phone
850-478-8355 fax

Dennis Griggs
Griggs Bergen LLP
Preston Plaza, Suite 1000
17950 Preston Road
Dallas, TX 75252
p 972-732-1001
f 972-732-9218

May 25, 2005

Re: Notice of Deposition
Perfect Foods, Inc. vs. John D. Gullahorn

Dear Mr. Griggs:

I am in receipt of your letter dated May 20, 2005 requesting deposition by telephone. At this time I am not able to stipulate to such a condition.

As you were notified in my letter dated December 30, 2004, I along my wife, Dr. Jean R. Gullahorn, will be handling this opposition. Should this situation change you will be notified appropriately.

Very truly yours,

John D. Gullahorn

EXHIBIT D

**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

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

Commissioner for Trademarks
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, VA 22202-3514

**MOTION FOR OPPOSER TO
ATTEND DEPOSITION BY TELEPHONE**

Pursuant to Federal Rules of Civil Procedure 30(b)(7), the Opposer requests the Board for an order permitting Opposer's counsel, Dennis T. Griggs, to appear, participate and attend by telephone the Applicant's testimony deposition that is presently scheduled at Anchor Court Reporting, 127 West Intendencia Street, Pensacola, Florida 32502 at 9 a.m.

MOTION

-1-

L1937.5324.4916

EXHIBIT D

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing STIPULATION FOR OPPOSER TO ATTEND DEPOSITION BY TELEPHONE has been forwarded this 25th day of May 2005, by e-mail and first class mail, postage prepaid and addressed to:

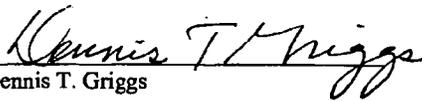
by e-mail: Dan@DanGullahorn.com

by mail: John D. Gullahorn

4111 Calico Drive

Cantonment, Florida 32533

By:



Dennis T. Griggs

Attorney for Opposer

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

EXHIBIT E

TTAB

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

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

07-21-2005
U.S. Patent & TMO/TM Mail Rpt D/L #74

OPPOSER'S NOTICE OF RELIANCE IN REBUTTAL

Opposer, Perfect Foods, Inc., hereby gives notice that it intends to rely on the Applicant's deemed admissions to Opposer's Requests For Admission Nos. 1-10 that were served to Applicant on November 12, 2004. Opposer relies on the deemed admissions for the purpose of rebutting the witness testimony given by John D. Gullahorn and Jean R. Gullahorn during Applicant's testimony period.

Opposer's Notice of Reliance in Rebuttal

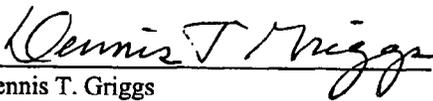
1

L1937.5324.4916

EXHIBIT E

Respectfully submitted,
Perfect Foods, Inc.
OPPOSER

Date: July 18, 2005

By: 
Dennis T. Griggs
Attorney for Opposer

Griggs Bergen LLP
17950 Preston Road, Suite 1000
Dallas, Texas 75252
(972) 447-4567

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

I hereby certify that this OPPOSER'S NOTICE OF RELIANCE IN REBUTTAL (along with Exhibits A, B and C 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
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

Dennis T. Griggs
(Typed name of person mailing paper)

Date: July 18, 2005


(Signature of person mailing paper)

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing OPPOSER'S NOTICE OF RELIANCE IN REBUTTAL (along with Exhibits A, B and C referred to as being attached or enclosed) has been forwarded this 18th day of July 2005, by 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



Dennis T. Griggs
Attorney for Opposer