

ESTTA Tracking number: **ESTTA398898**

Filing date: **03/18/2011**

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

Proceeding	92050093
Party	Plaintiff Whataburger Partnership LP
Correspondence Address	CHRISTOPHER KELLY WILEY REIN LLP 1776 K STREET NW WASHINGTON, DC 20006 UNITED STATES CKelly@wileyrein.com
Submission	Plaintiff's Notice of Reliance
Filer's Name	Jennifer L. Elgin
Filer's e-mail	jelgin@wileyrein.com, bcarlton@wileyrein.com, ckelly@wileyrein.com, ameltzer@wileyrein.com
Signature	/JLE/
Date	03/18/2011
Attachments	NOR 4-Final.pdf (15 pages)(7394488 bytes)

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

WHATABURGER PARTNERSHIP, L.P .)	
)	
Petitioner,)	
)	Cancellation No.: 92,050093
v.)	Reg. No.: 3,155,106
)	Mark: WHAT A PICKLE!
GIELOW PICKLES, INC.)	
)	
Respondent.)	

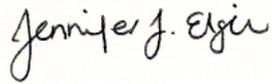
Petitioner’s Fourth Notice of Reliance

Pursuant to Rule 2.120(j) of the Trademark Rules of Practice, 37 C.F.R. § 2.120(j), Petitioner WHATABURGER PARTNERSHIP, hereby gives notice of its reliance upon “Applicant’s Objections and Responses to Petitioner’s First Set of Interrogatories to Applicant,” responses to Interrogatories Nos. 1, 5, 6, 8, 10, 11, 12, 14, 15, 16, 17 and 18.

These responses (redacted) are attached as Exhibit D hereto.

Respectfully submitted,

WHATABURGER PARTNERSHIP

By: 

Christopher Kelly
Jennifer L. Elgin
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Whataburger Partnership

Dated: March 18, 2011

EXHIBIT D

exclusive rights to its Mark WHAT A PICKLE via Respondent's family and the Mark of Respondent should remain the exclusive right of the Gielow family. As Respondent explained in its answer to Petitioner's Notice of Cancellation: Predecessors and family members, namely the grandfather, father and uncle of Registrant, owned J.J. Gielow & Sons of Detroit, Michigan. Founded in 1949, and owner of the Mark WHAT A PICKLE with dates of first use of January 1949, prior to any date Petitioner has claimed or could claim, J.J. Geilow & Sons was the parent company of Aunt Jane's Foods, with Aunt Jane's Foods a subsidiary of J.J. Gielow & Sons. J.J. Gielow & Sons assigned the registration of the mark WHAT A PICKLE, U.S. Registration No. 588866, to Aunt Jane's Foods, Incorporated on 05/03/1960 and Aunt Jane's continued extensive nationwide use of the mark WHAT A PICKLE on its pickle labels and packaging, in nationwide advertising, promotion, a green pickle-shaped full-sized truck, and *inter alia*, Marv Gielow, the uncle of Registrant Douglas Gielow, sponsored Gordon Deneau's "What A Pickle" race boats in the 1950's. Registrant's father retired as VP Manufacturing for Aunt Jane's Foods in 1966, and Registrant became Director of Manufacturing for Aunt Jane's Foods until Registrant resigned from Aunt Jane's Foods in 1970 to 're-start' Registrant's family business under the name Gielow Pickles, Inc. in 1970. Registrant was in charge of all pickle manufacturing for both pickle manufacturing plants, namely J.J. Geilow & Sons and Aunt Jane's Foods, from 1966 to 1970. Aunt Jane's Foods, Incorporated assigned the registration of the mark WHAT A PICKLE, U.S. Registration No. 588866, to The Borden Company on 03/28/1963. Borden distributed pickles under the Aunt Jane's label, continuously used the mark WHAT A PICKLE!, and Registrant personally ran the Borden Aunt Jane's division for Borden, unchanged in organization, for 6 years after Borden's bought Aunt Jane's. Aunt Jane's was the only pickle division of Borden. An employee working under Registrant at the Aunt Jane's plant confirmed that Borden was still using the mark WHAT A PICKLE! on the side of their trucks in 1993 even though Borden did not officially renew the WHAT A PICKLE! trademark. The Borden Company

assigned the mark WHAT A PICKLE, U.S. Registration No. 588866, to Borden, Inc. on 04/25/1968. As evidenced by the records of the USPTO, The Borden Company or Borden, Inc. maintained the mark WHAT A PICKLE, U.S. Registration No. 588866 that became U.S. Registration No. 783746, US Serial No 72/120,686, until 04/19/1985 at which time the records reveal the mark Expired Section 9. Seeing the mark WHAT A PICKLE! had been abandoned for some time, on January, 26, 2005, Registrant filed its application for the mark WHAT A PICKLE!, and on October 25, 2006 Registrant's mark, and the mark of Registrant's family, pre-dating any date of first use Petitioner could claim, was granted US Patent and Trademark Office Registration No 3155106. Registrant made a scrivener's error in Registrant's application that became Registration No 3155106 regarding the actual date of first use, which should have been January of 1949.

[REDACTED]

INTERROGATORY NO. 5: For each product identified in response to Interrogatory No. 4, describe with particularity:

- (a) The inclusive time period(s) during which it was/is promoted, sold, or offered for sale in connection with Respondent's Mark;
- (b) The channels of trade through which it has been marketed in connection with Respondent's Mark;
- (c) The classes of potential purchasers to whom Respondent has marketed each product in connection with Respondent's Mark;
- (d) The average wholesale and retail price of each unit of such product; and
- (e) State, both in units and to the nearest thousands of dollars, the annual wholesale and retail sales for each such product.

RESPONSE: The inclusive dates are 1949 to present. Registrant's goods are pickles, and Registrant's mark WHAT A PICKLE or WHAT A PICKLE! has appeared on the packaging of Registrant's goods since as early as 1949. Registrant's customers are primarily institutional, across the U.S. and Canada, and are restaurants, delicatessens, schools, caterers, and other similar businesses. Registrant's mark WHAT A PICKLE! appears on individually wrapped pickles sold in restaurants and schools by third parties. Pricing is shown on our web site at www.gielowpickles.com Units sold and annual wholesale sales are confidential and proprietary, Respondent objects to the request based on same, and this request is not reasonably calculated to result in admissible evidence. We do not sell directly to retail outlets, our pickle business is exclusively wholesale to the trade.

INTERROGATORY NO. 6: State the annual dollar amount spent by You on the advertisement/promotion of each separate product bearing Respondent's Mark.

RESPONSE: Respondent objects to this interrogatory on the grounds that it is overly broad and

unduly burdensome, seeks irrelevant information, and is not reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this interrogatory to the extent that it seeks the disclosure of confidential and/or proprietary information, such as trade secrets, financial information, and/or information subject to the terms of any applicable restriction on disclosure with which Respondent is obligated to comply. Notwithstanding and without waiving the foregoing objections, Respondent states that the annual dollar amount spent is insignificant in sum total, as the only and quite insignificant advertising/promotional 'expense' is the minimal cost of maintaining our 5-page web site at www.gielowpickles.com. We are a 5th generation pickle family. After nearly six decades exclusively in the pickle business, wholesale purchasers recognize our brand of pickles, and therefore we have no need for advertising or promotion beyond the very barest minimum.

[REDACTED]

INTERROGATORY NO. 8: Identify each agreement concerning Respondent's Mark (including licenses, assignments, liens, co-existence agreements and consent agreements).

RESPONSE: None.

[REDACTED]

[REDACTED]

INTERROGATORY NO. 10: Describe with particularity Respondent's sales of individually wrapped pickles to ultimate consumers through restaurants and schools and identify each restaurant, including its name and geographic location, through which pickles branded with Respondent's Mark are sold.

RESPONSE: We do not sell directly to restaurants or retail outlets. Primarily we deliver to institutional food distributors and they deliver to the end users. Numerous schools, delis, caterers, sandwich makers and restaurants use our individually wrapped pickles. Approximately 80% of the individually wrapped pickles we sell are sold "with sandwiches" as part of a 'package', where the sandwich is the predominant feature in the minds of the consumer, and not the individually wrapped pickle itself, and in the case of bundling our pickles with a sandwich, the individually wrapped pickle is not advertised or promoted. Of the remaining 20% sold without sandwiches as a package and therefore 'standalone', Respondent does not believe any of the individually packaged pickles are ever advertised or promoted, and instead are just in close proximity as a convenience at outlets that sell sandwiches in the same manner that potato chips might be offered. A representative sample includes sandwich maker Norwegian Jake from Warren Michigan that distributes through Wal-Mart Stores about 20,000 sandwiches a month with our individually wrapped pickles. Wa Wa convenience stores on the U.S. east coast sells around 100,000 sandwiches a month with our individually wrapped pickles. Mr. Pita in the U.S.

Midwest sells their pita sandwiches with our individually wrapped pickles. Pilot Gas Stations sell our individually wrapped pickles with their sandwiches. School systems such as Toledo Ohio Public Schools, Lakeland Florida School District, Port Huron Michigan Schools, and many other schools buy our individually wrapped pickles through several of our wholesalers. Disney buys individually wrapped pickles direct from us and sells them at several cart vendors throughout the Disney theme parks. National wholesalers such as Sysco and Gordon Foods sell our individually wrapped pickles from their various warehouses located in several cities in the U.S. as well as their locations in Canada. We also distribute our individually wrapped pickles from several individually owned wholesalers located in cities throughout the US and Canada.

INTERROGATORY NO. 11: Describe with particularity how You became the owner of Respondent's Mark and identify any assignment instruments or other documents referring to, relating to or reflecting transfer of title to Respondent's Mark to Respondent from a predecessor in interest.

RESPONSE: Applied for our family trademark after Dean Foods stopped paying the fee for the trademark, the trademark was not renewed, and the trademark became abandoned. See also my response to Interrogatory No. 1.

INTERROGATORY NO. 12: Describe with particularity the circumstances under which you first became aware of Borden, Inc.'s abandonment of use of the designation WHAT A PICKLE.

RESPONSE: Respondent first became aware of Borden, Inc's abandonment of the Mark WHAT A PICKLE when Borden, Inc. sold the Borden/Aunt Jane's pickle division to Dean Foods. Dean Foods then continued its use of the Mark WHAT A PICKLE on Aunt Jane's pickles until 2002 when Dean Foods shut its plant down.

[REDACTED]

INTERROGATORY NO. 14: Describe with particularity all communications between Borden, Inc. (and any other predecessors in interest) and You regarding assignment of rights in the designation WHAT A PICKLE.

RESPONSE: None.

INTERROGATORY NO. 15: Identify all facts that support Respondent’s contention in Respondent’s Initial Disclosures that Respondent’s Mark has been in continuous and ongoing use since 1949 to the present day such that Respondent is entitled to rely on 1949 as the date of first use of Respondent’s Mark.

RESPONSE: We have submitted several references to its use over the last 60 years. Also I personally saw it on the sides of Dean Foods semi trailers just a couple years before applying for the What A Pickle trademark. Also see response to Interrogatory No 1.

INTERROGATORY NO. 16: Identify all facts that support Respondent’s contention in Respondent’s Initial Disclosures that a clear and uninterrupted chain of title exists in

Respondent's Mark dating from 1949 to the present day such that Respondent is entitled to rely on 1949 as the date of first use of Respondent's Mark.

RESPONSE: See response to Interrogatory No 1 with the understanding that I personally remained in control of the pickles manufactured and sold in connection with the Mark WHAT A PICKLE even when the Mark was owned by Borden, Inc. The Mark WHAT A PICKLE was coined by my predecessor's of whom I am a direct descendant, the Mark has been in our family pickle business for nearly six decades and has developed significant fame and secondary meaning in connection with the quality and unique character of Gielow family pickles. The date of 1949 is indisputable and as revealed in our answer and Rule 26 Initial Disclosures.

INTERROGATORY NO. 17: Explain Respondent's reason for identifying January 26, 2005 as the date of first use of Respondent's Mark in United States Trademark Reg. No. 3,155,106.

RESPONSE: January 26, 2005 was the date we learned Dean Foods had abandoned the Mark so we started using it again and used that date in the application, even though we still were selling and promoting pickles under the Gielow family name as revealed in our direct ancestor's trademark registration of 1949. In retrospect, acting Pro Se, not being a trademark attorney and, at the time, without an understanding of the trademark process or procedures, the January 26, 2005 date on the application that matured to registration, though valid and lawful, should be 1949 as I discovered as I investigated Petitioner's claims or lack thereof. Also see response to Interrogatory No 1 as well as Affirmative Defenses in our answer, as well as our fairly extensive Rule 26 Initial Disclosures.

INTERROGATORY NO. 18: Explain Respondent's reason for identifying February 1, 2006 as the date of first use in commerce of Respondent's Mark in United States Trademark

Reg. No. 3,155,106.

RESPONSE: Again, acting Pro Se, and without in-depth knowledge of the trademark process, Respondent waited until Respondent was 'awarded' what Respondent believed to be a clear title to the Mark WHAT A PICKLE in an attempt to follow the rules to the best of Respondent's ability at the time. Respondent's application for the mark WHAT A PICKLE was filed on January 26, 2005 filing basis 1(b), intent to use, another minor though surely not fatal defect in the application. The Mark was never opposed by any party including Petitioner at the time it was Published for Opposition on 10/25/2005, and we received a Notice of Allowance on 1/17/2006. Respondent, still acting Pro Se, filed the Statement of Use pursuant to 15 U.S.C Section 1051(d) which reads as follows: "The applicant, Gielow Pickles, Inc, having an address of 5260 Main St, Lexington, Michigan United States 48450, is using or is using through a related company or licensee the mark in commerce on or in connection with the goods and/or services as follows: For International Class: 029, the applicant, or the applicant's related company or licensee, is using the mark in commerce on or in connection with all goods and/or services listed in the application or Notice of Allowance. The mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 01/26/2005, and first used in commerce at least as early as 02/01/2006 [emphasized], and is now in use in such commerce. The applicant is submitting one specimen for the class showing the mark as used in commerce on or in connection with any item in the class, consisting of a(n) Letterheads, invoices, individually wrapped pickles in bags, and labels for all our products have the What A Pickle! on them." The specimens bearing the Mark WHAT A PICKLE as provided by Respondent were virtually identical to the 1949 Registration of Respondent's family's Mark WHAT A PICKLE in the same class, and for 'pickles'. The date of February 1, 2006 is lawful

and true as Respondent’s use of the Mark WHAT A PICKLE remains ‘at least as early as February 1, 2006’. As a result of investigation into Petitioner’s Cancellation, it came to Respondent’s attention that the ‘106 application’s dates of first use “for pickles”, as well as the Mark itself, was much earlier, nearly six decades earlier to be more specific, namely 1949. Prior to this discovery, Respondent, acting Pro Se, was unaware of the bearing of the earlier registered and identical Mark WHAT A PICKLE that had been in the family for generations and which you could say Respondent took for granted, yet did not then understand trademark procedure.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

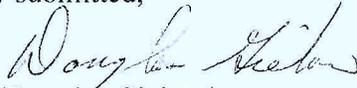
[REDACTED]

[REDACTED]

[REDACTED]

Dated: June 25, 2009

Respectfully submitted,

By: 
/Douglas Gielow/

Douglas Gielow
Individual, Registrant, US Citizen, CEO
Gielow Pickles, Inc
5260 Main St
Lexington, Michigan 48450
United States
Tel: 810 359 7680
Fax: 810 359 2408
Email: doug@gielowpickles.com

Certificate of Service

This is to certify that I, Douglas Gielow, individual, Registrant, US citizen, today served the above RESPONDENT'S RESPONSE TO PETITIONER'S FIRST SET OF INTERROGATORIES on Opposer by FIRST CLASS MAIL, addressed to Christopher Kelly, Esq., Wiley Rein LLP, 1776 K Street, N.W., Washington, DC 20006, Tel: 212.859.8383, email: ckelly@wileyrein.com

Dated: June 25, 2009 By: 
/Douglas Gielow/

Douglas Gielow
Registrant