

ESTTA Tracking number: **ESTTA418420**

Filing date: **07/07/2011**

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

## Notice of Opposition

Notice is hereby given that the following parties oppose registration of the indicated application.

### Opposers Information

Name	Hershey Chocolate & Confectionery Corporation		
Entity	Corporation	Citizenship	Delaware
Address	4860 Robb Street, Ste. 204 Wheat Ridge, CO 80033 UNITED STATES		

Name	The Hershey Company		
Entity	Corporation	Citizenship	Delaware
Address	100 Crystal A Drive Hershey, PA 17033 UNITED STATES		

Attorney information	Paul C. Llewellyn Kaye Scholer LLP 425 Park Avenue New York, NY 10022 UNITED STATES pllewellyn@kayescholer.com, jeiseid@kayescholer.com Phone:212 836 7828		
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### Applicant Information

Application No	85221585	Publication date	06/14/2011
Opposition Filing Date	07/07/2011	Opposition Period Ends	07/14/2011
Applicant	Wiesen, Kenneth B. 36 farmstead lane Brookville, NY 11545 UNITED STATES		

### Goods/Services Affected by Opposition

Class 030. All goods and services in the class are opposed, namely: Candy; Candy bars; Candy with caramel; Candy with cocoa; Chocolate candies
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### Applicant Information

Application No	85210942	Publication date	06/14/2011
Opposition Filing Date	07/07/2011	Opposition Period Ends	07/14/2011
Applicant	Kenneth B. Wiesen 36 Farmstead Lane Brookville, NY 11545 UNITED STATES		

## Goods/Services Affected by Opposition

Class 030. All goods and services in the class are opposed, namely: Candy; Candy bars
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## Grounds for Opposition

False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)

## Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	85257980	Application Date	03/04/2011
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	MILKSHAKE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2005/12/21 First Use In Commerce: 2005/12/21 Candy		

Attachments	85257980#TMSN.jpeg ( 1 page )( bytes ) Notice of Opposition 85221585 and 85210942.pdf ( 5 pages )(92334 bytes )
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## Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/paul c llewellyn/
Name	Paul C. Llewellyn
Date	07/07/2011

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

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HERSHEY CHOCOLATE & CONFECTIONERY :  
CORPORATION and THE HERSHEY COMPANY, :  
 :  
Opposers, :  
 :  
v. :  
 :  
KENNETH B. WIESEN, :  
 :  
Applicant. :  
 :  
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**CONSOLIDATED NOTICE OF OPPOSITION**

Applicant Serial No: 85/221,585  
Filed: January 19, 2011  
Published for Opposition: June 14, 2011  
Mark: MILKSHAKE

Applicant Serial No: 85/210,942  
Filed: January 5, 2011  
Published for Opposition: June 14, 2011  
Mark: MILK SHAKE

**TO:** Commissioner for Trademarks  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Opposers Hershey Chocolate & Confectionery Corporation, a Delaware corporation located and doing business at 4860 Robb Street, Ste. 204, Wheat Ridge, Colorado (“HC&CC”) and The Hershey Company, a Delaware corporation located and doing business at 100 Crystal A Drive, Hershey, Pennsylvania (“Hershey Company,” and, together with HC&CC, “Hershey”),

believe that they will be damaged by the registration of the marks shown in Applications Serial Nos. 85/221,585 and 85/210,942, and hereby oppose the same.

As grounds for opposition, Opposers, by and through their undersigned counsel, allege that:

1. Opposer HC&CC is the owner of a number of trademarks for candy, chocolate, confectionery, cocoa and related products, as well as a wide variety of services, including the famous KISSES<sup>®</sup>, REESE'S<sup>®</sup> and HERSHEY'S<sup>®</sup> families of trademarks for various products manufactured by its licensee, Opposer Hershey Company, a leading snack food company and the largest North American manufacturer of quality chocolate and non-chocolate confectionery products.

2. Since at least as early as 2005, Hershey has used the trademark MILKSHAKE in connection with various candy products, including certain of its KIT KAT-branded chocolate candy bars and its WHOPPERS-branded chocolate malt ball candy products. Hershey's MILKSHAKE trademark has been in continuous use throughout the United States since 2005.

3. As a result of the long use, promotion and advertising under Hershey's MILKSHAKE trademark, as well as the mark's inherently distinctive nature, the MILKSHAKE trademark has become associated in the minds of consumers with Hershey's products and has become a valuable asset of Hershey, serving as a symbol for Hershey's products and of the goodwill which is associated with those products.

4. Despite Hershey's prior common law rights in the MILKSHAKE trademark, Applicant filed an application for registration of the mark MILKSHAKE for "candy; candy bars; candy with caramel; candy with cocoa; chocolate candies" in International Class 30, as set forth in the notice of publication for Application Serial No. 85/221,585; and Applicant filed an

application for registration of the mark MILK SHAKE for “candy; candy bars” in International Class 30, as set forth in the notice of publication for Application Serial No. 85/210,942.

5. On March 4, 2011, HC&CC filed an application, Serial No. 85/257,980, to register its MILKSHAKE mark for “candy,” based on Hershey’s use in commerce of that mark since 2005 in connection with various chocolate candy products. On May 29, 2011, HC&CC’s application was suspended due to the pendency of Applicant’s applications to register the marks MILKSHAKE and MILK SHAKE.

6. Applicant’s MILKSHAKE mark is identical to, and Applicant’s MILK SHAKE mark is virtually identical to, the MILKSHAKE mark previously adopted and used by Hershey.

7. Applicant’s goods, as described in its applications opposed herein, are of the same type as the goods on which Hershey has used and uses its MILKSHAKE mark, and would be offered through the same or similar channels of trade to the same or similar customers or users as those goods offered by Hershey under its MILKSHAKE mark.

8. Opposers believe and therefore allege that use and registration of the marks covered by Application Serial Nos. 85/221,585 and 85/210,942 will damage Opposers, for the following reasons among others:

- a. that customers and purchasers of the respective goods would be confused, mistaken, or deceived as to the source and origin of Applicant’s goods rendered under the applied-for marks; and
- b. that customers and purchasers of the respective goods will assume, contrary to fact, that Applicant’s goods come from, are associated with, sponsored by, approved by, or otherwise related to or affiliated with Opposers.

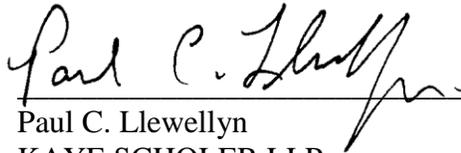
9. Applicant's applied-for marks so resemble Opposers' previously used mark MILKSHAKE, as to be likely, when applied to the goods set forth in Applicant's application, to cause confusion, mistake or deception within the meaning of 15 U.S.C. § 1052(d).

10. Applicant's applied-for marks so resemble Opposers' previously used mark MILKSHAKE, as to be likely, when applied to the goods set forth in Applicant's application, to falsely suggest a connection with the Opposers within the meaning of 15 U.S.C. § 1052(a).

WHEREFORE, Opposers respectfully pray that this Opposition be sustained and that registrations to Applicant be refused, and that Opposers be granted such other and further relief as the Board deems just and proper.

The Patent & Trademark Office and Trademark Trial and Appeal Board are hereby authorized to collect any fees necessitated by this Notice of Opposition from the deposit account of Opposers' attorneys, Kaye Scholer LLP, Deposit Account No. 11-0228.

Date: July 7, 2011  
New York, New York



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Attorneys for Opposers

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he caused the foregoing Consolidated Notice of Opposition to be served this 7<sup>th</sup> day of July, 2011, by U.S. first class mail, postage prepaid, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN  
36 FARMSTEAD LN  
BROOKVILLE, NY 11545-2634

  
Paul C. Llewellyn