

ESTTA Tracking number: **ESTTA540998**

Filing date: **05/31/2013**

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 party opposes registration of the indicated application.

**Opposer Information**

Name	Nature's Path Foods Inc.
Granted to Date of previous extension	06/01/2013
Address	9100 Van Horne Way Richmond, British Columbia, V6X 1W3 CANADA

Attorney information	Thomas M. Galgano GALGANO & ASSOCIATES, PLLC 20 W. Park Avenue, Suite 204 Long Beach, NY 11561 UNITED STATES office@galganoiplaw.com Phone:516-431-1177
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**Applicant Information**

Application No	85609486	Publication date	04/02/2013
Opposition Filing Date	05/31/2013	Opposition Period Ends	06/01/2013
Applicant	Societe des Produits Nestle S.A. CASE POSTALE 353 1800 VEVEY, SWITZERLAND		

**Goods/Services Affected by Opposition**

Class 030. All goods and services in the class are opposed, namely: Cereal-based snack foods; ready to eat cereal derived food bars; grain-based food bars; cereal and grain based energy bars
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**Grounds for Opposition**

Priority and likelihood of confusion	Trademark Act section 2(d)
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**Marks Cited by Opposer as Basis for Opposition**

U.S. Registration No.	3032671	Application Date	08/29/2003
Registration Date	12/20/2005	Foreign Priority Date	NONE
Word Mark	OPTIMUM		
Design Mark			
Description of	NONE		

Mark	
Goods/Services	Class 030. First use: First Use: 2005/04/04 First Use In Commerce: 2005/04/04 CEREAL-DERIVED, READY-TO-EAT FOOD BARS

U.S. Registration No.	3177333	Application Date	08/16/2000
Registration Date	11/28/2006	Foreign Priority Date	06/01/2000
Word Mark	OPTIMUM		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2000/11/08 First Use In Commerce: 2000/11/08 breakfast cereals		

U.S. Registration No.	3095192	Application Date	01/14/2005
Registration Date	05/23/2006	Foreign Priority Date	01/11/2005
Word Mark	OPTIMUM POWER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2003/01/00 First Use In Commerce: 2003/01/00 breakfast cereals, oatmeal		

U.S. Registration No.	3042351	Application Date	12/05/2001
Registration Date	01/10/2006	Foreign Priority Date	09/14/2001
Word Mark	OPTIMUM SLIM		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2002/02/00 First Use In Commerce: 2002/02/00 BREAKFAST CEREALS		

Attachments	Notice of Opposition.pdf(223014 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	/Jessica G. Bower/
Name	Jessica G. Bower
Date	05/31/2013



I hereby certify that this correspondence is being transmitted via the United States Patent & Trademark Office Trademark Trial and Appeal Board's Electronic System for Trademark Trial and Appeals (ESTTA) on May 31, 2013.

Jessica G. Bower

Signature: Jessica Bower

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

In the matter of Trademark Application Serial No.:85/609,486

Applicant: Société des Produits Nestlé S.A.

Mark: FUEL FOR OPTIMUM PERFORMANCE

Filed: April 26, 2012

Published in the Official Gazette on: April 02, 2013

International Class: 30

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NATURE'S PATH FOODS INC.

Opposer,

against

SOCIÉTÉ DES PRODUITS NESTLÉ S.A.

Applicant.  
-----X

Opposition No.:

Box TTAB Fee

Assistant Commissioner of Trademarks

United States Patent and Trademark Office

Trademark Trial and Appeal Board

P.O. Box 1451

Alexandria, VA 22313-1451

**NOTICE OF OPPOSITION**

NATURE'S PATH FOODS INC. ("Opposer"), a corporation organized and existing under the laws of Canada, located at 9100 Van Horne Way, Richmond, British Columbia, V6X 1W3, Canada, believes that it is or will be damaged by application Serial

No. 85/609,486 for the mark FUEL FOR OPTIMUM PERFORMANCE filed on April 26, 2012 by SOCIÉTÉ DES PRODUITS NESTLÉ S.A. (“Applicant”) and hereby opposes the same.

As grounds of the Opposition, Opposer alleges that:

1. Opposer is one of North America’s leading organic breakfast cereal manufacturers. Opposer also manufactures a variety of other food products, including food bars. Opposer has a family of marks each employing the distinctive mark OPTIMUM, which creates a public perception of its family of OPTIMUM marks for food products.
2. Opposer is the owner of the following trademark registrations for its family of OPTIMUM marks:
  - a. US Trademark Registration No. 3,032,671, registered December 20, 2005 for the mark OPTIMUM for cereal-derived ready-to-eat food bars, in class 30;
  - b. US Trademark Registration No. 3,177,333, registered November 28, 2006 for the mark OPTIMUM for breakfast cereals, in class 30;
  - c. US Trademark Registration No. 3,095,192, registered May 23, 2006 for the mark OPTIMUM POWER for breakfast cereals and oatmeal, in class 30;
  - d. US Trademark Registration No. 3,042,351, registered January 10, 2006 for the mark OPTIMUM SLIM for breakfast cereals, in class 30 (hereinafter collectively referred to as “Opposer’s OPTIMUM trademarks”).
3. Upon information and belief, Applicant is the owner of U.S. Trademark Application Serial No. 85/609,486, filed April 26, 2012 for the mark FUEL FOR

OPTIMUM PERFORMANCE based on intent to use in association with the following goods:

Class 5: Dietary and nutritional supplements; vitamin supplements; mineral supplements; Powdered nutritional supplement drink mix; Dietary supplement drink mixes; Dietary supplemental drinks in the nature of vitamin and mineral beverages;

Class 30: Cereal-based snack foods; ready to eat cereal derived food bars; grain-based food bars; cereal and grain based energy bars;

Class 32: Isotonic drinks; sports drinks, namely, energy drinks, performance drinks and recovery drinks; sports drinks enhanced with vitamins, minerals and nutrients; powders and concentrates used in the preparation of sports drinks; Energy drinks enhanced with vitamins and minerals.

4. Upon information and belief, Applicant has not begun use of the aforesaid mark FUEL FOR OPTIMUM PERFORMANCE in commerce for the goods referred to in paragraph 3 of this Notice of Opposition.
5. Opposer's OPTIMUM trademark has been sold and marketed in the United States on breakfast cereals since at least November 2000 and on cereal-derived, ready-to-eat food bars since at least April 2005. Opposer's OPTIMUM POWER trademark has been sold and marketed in the United States on breakfast cereals and oatmeal since at least January 2003. Opposer's OPTIMUM SLIM trademark has been sold and marketed in the United States on breakfast cereals since at least February 2002. Such use by Opposer of Opposer's OPTIMUM trademarks has been valid and continuous in the United States in commerce since such aforesaid dates of first use, long before Applicant's filing date and has not been abandoned.

6. Opposer has extensively used, advertised, promoted and offered Opposer's goods bearing Opposer's OPTIMUM trademarks to the public through various channels of trade so that the public has come to associate the Opposer's OPTIMUM trademarks with the Opposer and the goods sold by the Opposer.
7. Applicant's mark FUEL FOR OPTIMUM PERFORMANCE is substantially similar to Opposer's OPTIMUM trademarks.
8. The goods on which Applicant proposes to use the mark in Class 30, namely, cereal-based snack foods; ready to eat cereal derived food bars; grain-based food bars; cereal and grain based energy bars are identical to, substantially similar to and/or commercially related to the goods of the Opposer used in association with the Opposer's OPTIMUM trademarks.
9. Applicant's goods and Opposer's goods would travel in the same channels of trade, be sold in the same types of retail outlets and be purchased by the same class of customers.
10. In view of the substantial similarity between Opposer's OPTIMUM trademarks and Applicant's mark FUEL FOR OPTIMUM PERFORMANCE, as well as the identity and similar nature of the goods, channels of trade and intended customers, registration of the mark FUEL FOR OPTIMUM PERFORMANCE is likely to cause confusion, mistake or deception to purchasers as to the source of Applicant's goods, and therefore it is requested that registration to Applicant be refused under Section 2(d) of the Trademark Act.
11. Applicant's mark FUEL FOR OPTIMUM PERFORMANCE so resembles Opposer's OPTIMUM trademarks due to the similarities between Opposer's and Applicant's marks, as to be likely to cause confusion, to cause mistake, and/or to deceive within the meaning of §2(d) of the Trademark Act of 1946, whereby the

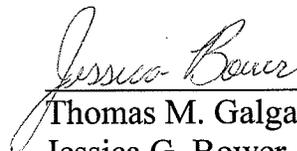
purchasing public will believe that Applicant's goods emanate from, or in some way are associated or connected with, or sponsored, authorized or warranted by Opposer, all to the detriment of Opposer, and Opposer will be damaged if a registration is granted to Applicant.

WHEREFORE, Opposer believes that it will be damaged by the registration of Application Serial No. 85/609,486 and respectfully requests that registration be refused and this opposition be sustained.

Credit Card Payment in the amount of three hundred (\$300) dollars is submitted electronically to cover the official filing fee for filing the Notice of Opposition for one class of goods. The Commissioner is hereby authorized to credit any overpayment or charge any fee deficiency to Deposit Account No. 50-3990.

Respectfully submitted,

NATURE'S PATH FOODS INC.



Thomas M. Galgano, Esq.

Jessica G. Bower, Esq.

Attorneys for Opposer

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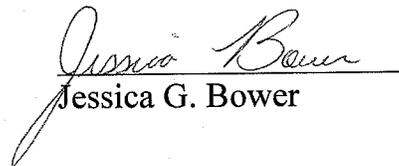
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing NOTICE OF OPPOSITION has this 31<sup>st</sup> day of May, 2013 been sent by first class mail, postage prepaid to:

Jacqueline M. Stelling, Esq.  
Nestle Nutrition  
12 Vreeland Road, Floor 2  
Florham Park, New Jersey 07932

  
Jessica G. Bower