

ESTTA Tracking number: **ESTTA103947**

Filing date: **10/12/2006**

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                                  | KELLOGG NORTH AMERICA COMPANY                                                                                                                                                      |
| Granted to Date of previous extension | 10/15/2006                                                                                                                                                                         |
| Address                               | One Kellogg Square PO Box 3599<br>Battle Creek, MI 49016<br>UNITED STATES                                                                                                          |
| Attorney information                  | Lisabeth H. Coakley<br>Harness, Dickey & Pierce, PLC<br>5445 Corporate Drive Suite 200<br>Troy, MI 48098<br>UNITED STATES<br>tjcomparoni@hdp.com,dhaarz@hdp.com Phone:248-641-1600 |

**Applicant Information**

|                        |                                                                                                   |                        |            |
|------------------------|---------------------------------------------------------------------------------------------------|------------------------|------------|
| Application No         | 78690204                                                                                          | Publication date       | 04/18/2006 |
| Opposition Filing Date | 10/12/2006                                                                                        | Opposition Period Ends | 10/15/2006 |
| Applicant              | NutriSystem IPHC, Inc.<br>Suite 1704 300 Delaware Avenue<br>Wilmington, DE 19801<br>UNITED STATES |                        |            |

**Goods/Services Affected by Opposition**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Class 030.<br>All goods and services in the class are opposed, namely: Milkshakes, puddings, breakfast, lunch, dinner entrees, snacks and desserts, namely, cereals, cereal bars, namely, ready to eat, cereal derived food bars, muffins, breads, dessert bars, namely, brownies, coffee flavored dessert bars, chocolate crunch bars, peanut butter, caramel and mint chewy chocolate bars, fruit bars, nut bars, rice, sauces, namely, salsas and tomato sauces, gravies, salad dressings, frozen bars and ices, namely fudge bars, frozen confections and ice pops, food beverages with a coffee, tea or cocoa base, namely, coffee based beverages containing milk, cocoa based beverages containing milk, iced teas |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                     |                                                                              |
|---------------------|------------------------------------------------------------------------------|
| Related Proceedings | Opposition to Serial No. 78690201                                            |
| Attachments         | NUTRIPEPTIDE in Class 30 Notice of Opposition.pdf ( 4 pages )(145759 bytes ) |
| Signature           | /david r haarz/                                                              |
| Name                | David R. Haarz                                                               |

|      |            |
|------|------------|
| Date | 10/12/2006 |
|------|------------|

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

|                                          |   |                      |
|------------------------------------------|---|----------------------|
| <b>KELLOGG NORTH AMERICA COMPANY,</b>    | ) |                      |
|                                          | ) |                      |
| Opposer,                                 | ) |                      |
|                                          | ) |                      |
| v.                                       | ) | Opposition No. _____ |
|                                          | ) | Serial No. 78690204  |
| <b>NUTRISYSTEM IPHC, INC.</b>            | ) | Mark: NUTRIPEPTIDE   |
|                                          | ) |                      |
| Applicant.                               | ) |                      |
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**NOTICE OF OPPOSITION**

Kellogg North America Company, a Delaware corporation, located and doing business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016 (hereinafter "Opposer"), believes that it will be damaged by the registration of the mark shown in Application Serial No. 78690204 in Class 30 filed by NutriSystem IPHC, Inc. (hereinafter "Applicant") on August 10, 2005, and opposes Application Serial No. 78690204.

The grounds for this opposition are as follows:

1. Opposer's predecessor in interest, Kellogg Company ("Kellogg") was incorporated in 1922 as the successor to the original company established by its founder, W. K. Kellogg, in 1906, and since long prior to Applicant's filing date for this application, Kellogg has been engaged in the manufacture, distribution, marketing, advertising, promotion and sale in interstate commerce of a wide variety of food products, including snack food bars, granola bars, cereal bars, toaster pastries, breakfast foods such as waffles and pancakes, and cereal-derived food products used as breakfast food or snack

food which are competitive with or closely related to those goods identified in Application Serial No. 78690204.

2. Opposer is the owner of the following marks and federal registrations therefor:

| <b><u>Mark</u></b>             | <b><u>Registration No.</u></b> | <b><u>Goods</u></b>                                                                                  |
|--------------------------------|--------------------------------|------------------------------------------------------------------------------------------------------|
| NUTRI-GRAIN                    | 1,255,436                      | cereal-derived food product to be used as a breakfast food, snack food or ingredient for making food |
| NUTRI-GRAIN                    | 1,367,960                      | waffles                                                                                              |
| NUTRI-GRAIN FRUIT-FULL SQUARES | 2,426,551                      | cereal-derived food product to be used as a breakfast food, snack food or ingredient for making food |

(The "NUTRI-GRAIN marks").

3. The above-referenced registrations are valid, subsisting and conclusive evidence of Opposer's exclusive right to use the marks covered by such registrations in commerce for the goods specified in said registrations.

4. In addition to its registered marks set forth above, Opposer will rely upon its common law usage of its NUTRI-GRAIN marks for various products, including promotional and licensed products.

5. Opposer has made substantial investment in advertising and promoting its goods under its NUTRI-GRAIN marks since their initial use. Opposer, its predecessor in interest and licensees have extensively used, advertised, promoted and offered goods bearing its NUTRI-GRAIN marks to the public through various channels of trade in commerce, with the result that Opposer's customers and the public in general have come

to know and recognize Opposer's marks and associate same with Opposer and/or goods sold by Opposer's licensees.

6. By virtue of its prior uses of its NUTRI-GRAIN marks, Opposer has acquired prior statutory and common law rights in its NUTRI-GRAIN marks.

7. Applicant's use, on or in connection with the goods identified in Application Serial No. 78690204 of NUTRIPEPTIDE will cause confusion, or mistake or to deceive the public into believing that such products originate with Opposer, to the damage and detriment of Opposer and its reputation..

8. Opposer's customers and the public in general are likely to be confused, mistaken or deceived as to the origin and sponsorship of Applicant's proposed goods to be marketed under Applicant's NUTRIPEPTIDE mark and misled into believing that such goods are either made or licensed by Opposer, are a branded ingredient for Opposer's food products or are in some way directly or indirectly associated with Opposer, to the damage and detriment of Opposer and its reputation.

9. Opposer will be damaged by the registration by Applicant of its NUTRIPEPTIDE mark, as set forth in Trademark Application Serial No. 78690204, in that the mark is substantially similar to Opposer's registered and common law NUTRI-GRAIN marks and will be used in connection with goods identical to and/or closely related to the goods offered to the public by Opposer.

10. Opposer's NUTRI-GRAIN marks are famous and distinctive and became famous and distinctive well prior to the filing of this application and/or well prior to Applicant's actual or constructive use of its NUTRIPEPTIDE mark.

11. Opposer believes that it will be damaged by the registration by Applicant of

the NUTRIPEPTIDE mark, as set forth in Applicant's Trademark Application Serial No. 78690204, in that the NUTRIPEPTIDE mark will or is likely to dilute the distinctiveness of Opposer's famous NUTRI-GRAIN marks.

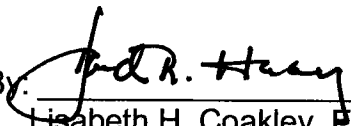
**WHEREFORE**, Opposer believes that it is and will continue to be damaged by registration of the NUTRIPEPTIDE mark as set forth in Applicant's Application Serial No. 78690204 and requests that said application be rejected, that no registration be issued thereon to Applicant, and that this Opposition be sustained in favor of Opposer.

The United States Patent and Trademark Office is hereby authorized to charge or credit Deposit Account No. 08-0750 for any fees or overages in connection with this proceeding.

Respectfully Submitted,

KELLOGG NORTH AMERICA COMPANY

Date: October 12, 2006

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