

ESTTA Tracking number: **ESTTA107358**

Filing date: **11/01/2006**

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 parties oppose registration of the indicated application.

Opposers Information

Name	McKee Foods Kingman, Inc.
Granted to Date of previous extension	11/01/2006
Address	2675 West Oatman Road Kingman, AZ 86413 UNITED STATES

Name	McKee Foods Corporation		
Entity	Corporation	Citizenship	Tennessee
Address	P.O. Box 750 Collegedale, TN 37315-0750 UNITED STATES		

Attorney information	Lile H. Deinard, Esq. Dorsey & Whitney LLP 250 Park Avenue, 15th Floor New York, NY 10177 UNITED STATES ny.trademark@dorsey.com, deinard.lile@dorsey.com Phone:(212) 415-9200
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Applicant Information

Application No	78779321	Publication date	07/04/2006
Opposition Filing Date	11/01/2006	Opposition Period Ends	11/01/2006
Applicant	Hershey Chocolate & Confectionery Corp. Suite 204 4860 Robb Street Wheat Ridge, CO 80033 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. All goods and services in the class are opposed, namely: Meal replacement bars, mixes, drinks, powders and shakes; nutritionally fortified beverages and nutritional food supplement bars

Attachments	Notice of Opposition 78779321.pdf (4 pages)(33950 bytes)
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Signature	/lhd/
Name	Lile H. Deinard, Esq.
Date	11/01/2006

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

In Re: Application Serial No. 78/779,321
Filed: December 22, 2005
Mark: NOW YOU'RE SNACKING SMART
Applicant: Hershey Chocolate & Confectionery Corp.

Published In The Official Gazette of July 4, 2006

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MCKEE FOODS KINGMAN, INC., and :
MCKEE FOODS CORPORATION :
:
Opposer, : OPPOSITION NO.
:
v. : **NOTICE OF OPPOSITION**
:
HERSHEY CHOCOLATE & :
CONFECTIONERY CORP., :
Applicant. :
:
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McKee Foods Kingman, Inc., a corporation organized and existing under the laws of the State of Arizona, located at 2675 West Oatman Road, Kingman, Arizona 86413, and McKee Foods Corporation, a corporation of Tennessee, located at Collegedale, Tennessee (hereinafter collectively referred to as "Opposer") believe that they will be damaged by registration of the designation NOW YOU'RE SNACKING SMART for "meal replacement bars, mixes, drinks, powders and shake; nutritionally fortified beverages and nutritional food supplement bars", in International Class 5 sought by U.S. Application Serial No. 78/779,321 and oppose that application for registration.

As grounds for opposition, it is alleged that:

1. Opposer is now, and for many years has been, engaged in the marketing, sale, promotion and/or distribution of a wide variety of baked goods, snack products and cereal products.

2. Since long prior to December 22, 2005, the filing date of the ITU application herein opposed, Opposer has manufactured, marketed and sold food products under the trademark SNACK SMART, including food bars, cereals, candy fruit snacks, fruit and grain bars, granola bars, snack cakes, oatmeal creme pies, snack bars, and cookies.

3. Opposer McKee Foods Kingman, Inc. is the owner of U.S. Registration No. 2,107,921 issued October 21, 1997, in the United States Patent and Trademark Office based on first use of the trademark SNACK SMART of June 10, 1996 for “cakes, snack cakes, cookies, pies, and other bakery goods (excluding bread).” Opposer McKee Food Corporation uses the SNACK SMART trademark under license and is McKee Foods Kingman’s related company within the meaning of Section 45 of the Lanham Act.

4. With first use of Opposer’s SNACK SMART trademark occurring on June 10, 1996, Opposer has subsequently manufactured, promoted, distributed and sold food products bearing the SNACK SMART trademark in interstate commerce and purchasers of Opposer’s SNACK SMART products have come to recognize and do recognize the SNACK SMART trademark as being used by Opposer and to associate and identify said mark with Opposer and its products. Opposer derives substantial goodwill and value therefrom and from its common-law rights acquired in the trademark SNACK SMART, which rights arose on June 10, 1996.

5. Opposer McKee Foods Kingman, Inc. is also the owner of the following applications to register SNACK SMART and Design:

(a) Application Serial No. 78/816,851 filed February 16, 2006 for “oatmeal creme pies, fruit and grain bars, breakfast cereal, snack bars,” claiming first use in commerce of the mark in the form depicted of August 7, 2003;

(b) Application Serial No. 78/816,865 filed February 16, 2006 for “oatmeal creme pies, fruit and grain bars, breakfast cereal, snack bars,” claiming first use of the mark in commerce in the form depicted of August 7, 2003;

(c) Application Serial No. 77,006,745 filed September 25, 2006 for “cookies,” claiming first use of the mark in commerce in the form depicted of September 22, 2006; and

(d) Application Serial No. 77,006,726 filed September 25, 2006 for “cookies”, claiming first use of the mark in commerce of the form depicted of September 22, 2006.

6. By the application herein opposed, Applicant seeks to register the mark NOW YOU'RE SNACKING SMART for “meal replacement bars, mixes, drinks, powders and shakes; nutritionally fortified beverages and nutritional food supplement bars” in International Class 5. The application was filed on December 22, 2005 on the basis of an intent to use the mark in commerce on the recited goods. Said mark NOW YOU'RE SNACKING SMART, when applied to Applicant's food products, so resembles Opposer's SNACK SMART trademark for Opposer's goods as to be likely to cause confusion and mistake, and to deceive the consuming public and the trade, with consequent injury to Opposer.

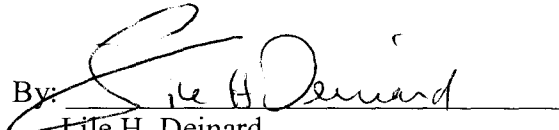
7. Opposer will be damaged by the registration sought by Applicant because such registration will support and assist Applicant in the confusing, misleading, and diluting use of Applicant's mark sought to be registered, in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), and will give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of Opposer in its mark.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that this opposition be sustained and that Application Serial No. 78/779,321 be denied.

Please recognize as attorneys for Opposer in this proceeding Lile H. Deinard, Bruce R. Ewing, Steven S. Fang and Amy Stasik, members of the Bar of the State of New York, whose address is Dorsey & Whitney LLP, 250 Park Avenue, New York, New York 10177, telephone number (212) 735-0778.

Dated: November 1, 2006

DORSEY & WHITNEY LLP

By: 
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McKee Foods Corporation