

ESTTA Tracking number: **ESTTA271454**

Filing date: **03/11/2009**

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	03/11/2009
Address	One Kellogg Square PO Box 3599 Battle Creek, MI 49016 UNITED STATES
Correspondence information	GEOFFREY D AURINI COUNSEL Kellogg North America Company One Kellogg Square, PO Box 3599 Battle Creek, MI 49016 UNITED STATES trademarks@kellogg.com Phone:269-961-9333

Applicant Information

Application No	77519273	Publication date	11/11/2008
Opposition Filing Date	03/11/2009	Opposition Period Ends	03/11/2009
Applicant	Kraft Foods Holdings, Inc. Three Lakes Drive Northfield, IL 60093 UNITED STATES		

Goods/Services Affected by Opposition

Class 030. All goods and services in the class are opposed, namely: Cookies
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)

Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	1553949	Application Date	01/06/1989
Registration Date	08/29/1989	Foreign Priority Date	NONE
Word Mark	MAGIC MIDDLES		
Design Mark			

Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 1988/12/05 First Use In Commerce: 1988/12/05 COOKIES

Attachments	MIDDLES Opposition Notice scan.pdf (5 pages)(545563 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	/GEOFFREY D AURINI/
Name	GEOFFREY D AURINI
Date	03/11/2009

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

KELLOGG NORTH AMERICA COMPANY)	
)	
Opposer,)	
)	
v.)	Opposition No. _____
)	Serial No. 77/519,273
KRAFT FOODS HOLDINGS, INC.)	Mark: MIDDLES
)	Filing Date: July 10, 2008
Applicant.)	Publication Date: November 11, 2008
)	

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 called "Opposer"), believes that it will be damaged by the registration of the mark shown in Application Serial No. 77/519,273 in Class 30 by Kraft Foods Holdings, Inc. (hereinafter "Applicant") on July 10, 2008, and opposes Application Serial No. 77/519,273.

The grounds for this opposition are as follows:

SECTION (2)(e)(1) – Mark is merely descriptive

1. Commencing long prior to Applicant's filing date, Opposer and Opposer's predecessors in interest, Kellogg Company and Keebler Company, have engaged, and Opposer is now engaged in the manufacture, distribution, marketing, advertising, promotion and sale in interstate commerce of various types of food products, including cookies.

2. Applicant in the application opposed herein seeks to register the alleged mark MIDDLES for cookies.

3. The term "middles" is a common descriptive term or merely descriptive term describing the portion of a cookie between two wafers or otherwise describing cookies with "middles" and is therefore without acquired distinctiveness and is incapable of distinguishing

applicant's cookies from those of others. The file histories of prior marks, in particular LOTSA' MIDDLE (Reg. Nos. 1,104,084 and 1,383,573), CHOCOLATE MIDDLES (Reg. No. 1,707,042) and MEGA MIDDLES (Ser. No. 76/333,595) recognize the descriptive nature of "middle(s)" in connection with cookies. LOTSA' MIDDLE was first registered on the Supplemental Register and then registered on the Principal Register after showing the acquisition of secondary meaning. CHOCOLATE MIDDLES was also registered on the Principal Register after showing the acquisition of secondary meaning while MEGA MIDDLES was approved with a disclaimer of "MIDDLES".

4. Registration of the mark MIDDLES *per se* would be inconsistent with Opposer's right to the free and unfettered use of the term in connection with cookies and wrongfully creates the appearance, to the detriment of Opposer, that Applicant has the right to exclusive use of the term "MIDDLES" in connection with cookies

5. Furthermore, as Applicant's application has been submitted on an Intent-to-Use basis only, Applicant is relying only on proposed use of its alleged mark and has no quantum of substantially exclusive use on which it can rely to overcome the inherently descriptive nature of its alleged mark through a showing of the acquisition of secondary meaning.

SECTION 2(d) – Priority and Likelihood Of Confusion

6. In the alternative, Opposer opposes on the basis of likelihood of confusion with Opposer's MAGIC MIDDLES registration.

7. Opposer is the owner of the following federally registered trademark:

MARK	REG. NO.	ISSUE DATE	GOODS
MAGIC MIDDLES	1,553,949	08/29/1989	Cookies

(hereafter referred to as "Opposer's Registered Mark") This registration remains valid, subsisting and owned by Opposer and is conclusive evidence of Opposer's exclusive right to use the mark covered by such registration in commerce on the goods set forth in such registration.

8. Upon information and belief, notwithstanding Opposer's Registered Mark, on July 10, 2008, Applicant filed an application for registration of the proposed trademark MIDDLES in plain, typed form for "Cookies" in International Class 30. Said application was assigned Serial No. 77/519,273, and was published for Opposition in the Official Gazette of November 11, 2008.

9. Opposer's Registered Mark and Applicant's proposed MIDDLES mark are confusingly similar in sound, appearance and meaning as to be likely, when applied to Applicant's goods to cause confusion or mistake or to deceive purchasers resulting in damage and detriment to Opposer and its reputation. Further, the Applicant's goods are identical to Opposer's goods.

10. Opposer, upon information and belief, avers that its ultimate consumers, and the public in general, are likely to be confused, mistaken or deceived as to the origin and sponsorship of Applicant's goods marketed under the alleged MIDDLES mark and misled into believing that such goods emanate from, or are licensed by or are in some way directly or indirectly associated with Opposer, to the damage and detriment to Opposer and its reputation.

11. Opposer, upon information and belief, avers that it will be damaged by the registration by Applicant of the proposed MIDDLES mark, as set forth in Trademark Application Serial No. 77/519,273 in that the alleged mark is identical to the second word of Opposer's Registered Mark and will be used in connection with goods that are directly competitive with and identical to the goods offered to the public by Opposer.

Wherefore, this Opposer, Kellogg North America Company, believes and avers that it is being and will continue to be damaged by registration of the proposed MIDDLES trademark as aforesaid, and prays that said Application Serial No. 77/519,273 be rejected in accordance with the allegations set forth above and that no registration be issued thereon to Applicant, and that this Opposition be sustained in favor of Opposer.

Respectfully Submitted,
KELLOGG NORTH AMERICA COMPANY

By:  _____

Geoffrey D. Aurini

Counsel

Kellogg North America Company

One Kellogg Square, P.O. Box 3599

Battle Creek, MI 49016-3599

Date: March 11, 2009

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

KELLOGG NORTH AMERICA COMPANY)	
)	
Opposer,)	
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v.)	Opposition No. _____
)	Serial No. 77/519,273
KRAFT FOODS HOLDINGS, INC.)	Mark: MIDDLES
)	Filing Date: July 10, 2008
Applicant.)	Publication Date: November 11, 2008
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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Notice of Opposition has been served on the following correspondent and attorney of record for Kraft Foods Holdings, Inc. as listed on the TARR database of the United States Patent and Trademark Office by mailing said copy on March 11, 2009, via First Class Mail, postage prepaid to:

Demetra Merikas
Kraft Foods Holdings, Inc.
3 Lakes Drive
Northfield, IL 60093-2754



Patricia A. Conor PP, PLS