

ESTTA Tracking number: **ESTTA314968**

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

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 parties oppose registration of the indicated application.

Opposers Information

Name	Hershey Chocolate & Confectionery Corporation
Granted to Date of previous extension	11/04/2009
Address	4860 Robb Street, Suite 204 Wheat Ridge, CO 80033 UNITED STATES

Name	The Hershey Company
Granted to Date of previous extension	11/04/2009
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, jeischeid@kayescholer.com Phone:2121 836 7828
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Applicant Information

Application No	77268291	Publication date	07/07/2009
Opposition Filing Date	11/03/2009	Opposition Period Ends	11/04/2009
International Registration No.	NONE	International Registration Date	NONE
Applicant	The Allan Candy Company Limited 356 Emerald Street North Hamilton, ON L8L8K6 CANADA		

Goods/Services Affected by Opposition


Class 030. All goods and services in the class are opposed, namely: Confectionery, namely, candy


Grounds for Opposition

False suggestion of a connection	Trademark Act section 2(a)
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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.	2553393	Application Date	09/02/1999
Registration Date	03/26/2002	Foreign Priority Date	NONE
Word Mark	TROPICAL TREMOR		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2000/04/15 First Use In Commerce: 2000/04/15 Beverages, namely, soft drink mixes, powders, syrups or concentrates used in the preparation of soft drinks		

U.S. Registration No.	3668537	Application Date	07/30/2008
Registration Date	08/18/2009	Foreign Priority Date	NONE
Word Mark	TROPICAL TREMOR		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2008/06/16 First Use In Commerce: 2008/06/16 Punch; Soft drinks, namely, non-carbonated soft drinks		

U.S. Application No.	77080520	Application Date	01/11/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	TREMOR		

Design Mark	<h1>TREMOR</h1>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: Nutritional shakes for use as a meal substitute		

U.S. Application No.	77080521	Application Date	01/11/2007
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	TREMOR		
Design Mark	<h1>TREMOR</h1>		
Description of Mark	NONE		
Goods/Services	Class 029. First use: Dairy-based beverages		

U.S. Application No.	77115721	Application Date	02/26/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	TREMOR		

Design Mark	<h1>TREMOR</h1>
Description of Mark	NONE
Goods/Services	Class 032. First use: Energy drinks

Related Proceedings	91190897
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Attachments	75791290#TMSN.gif (1 page)(bytes) 77534512#TMSN.jpeg (1 page)(bytes) 77080520#TMSN.jpeg (1 page)(bytes) 77080521#TMSN.jpeg (1 page)(bytes) 77115721#TMSN.jpeg (1 page)(bytes) 77268291 Notice of Opposition.pdf (7 pages)(204734 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	11/03/2009

1. Opposer HC&CC is the owner of a number of trademarks for candy, chocolate, confectionery, cocoa and related products, and beverages and soft drinks, including the TROPICAL TREMOR mark and the TREMOR mark for various products, including soft drinks and other beverages, manufactured by sublicensees pursuant to licenses from HC&CC's licensee, Opposer Hershey Company, a leading snack food company and the largest North American manufacturer of quality chocolate and non-chocolate confectionery products.

2. At least as early as 1999, Opposers' predecessor in interest began selling beverage products under the mark TROPICAL TREMOR. A registration for the TROPICAL TREMOR mark was issued on March 26, 2002, Reg. No. 2,553,393, for "[b]everages, namely, soft drink mixes, powders, syrups or concentrates used in the preparation of soft drinks." HC&CC is the assignee and present owner of all right, title and interest in and to Reg. No. 2,553,393 and the mark covered by this registration.

3. Hershey also owns a registration for the mark TROPICAL TREMOR, Reg. No. 3,668,537, for "[p]unch" and "soft drinks," which was registered on August 18, 2009 with a first use date of June 16, 2008. This mark is currently used, along with the well-known JOLLY RANCHER trademark, for soda products as well as for a frozen beverage product.

4. Hershey also owns three Intent-to-Use Applications, for which Notices of Allowance have issued, to register the TREMOR mark for shakes, beverages and energy drinks (collectively referred to herein as the "TREMOR marks"). The chart below includes all of the registrations and applications that Hershey owns for the TROPICAL TREMOR marks and the TREMOR marks.

Trademark	Reg. or Ser. No.	Class	Goods	Priority Date
TROPICAL TREMOR	Reg. 2553393	32	Beverages, namely, soft drink mixes, powders, syrups or concentrates used in the preparation of soft drinks	9/2/1999
TREMOR	Ser. 77080520	5	Nutritional shakes for use as a meal substitute	1/11/2007
TREMOR	Ser. 77080521	29	Dairy-based beverages	1/11/2007
TREMOR	Ser. 77115721	32	Energy drinks	2/26/2007
TROPICAL TREMOR	Reg. 3668537	32	Punch; Soft drinks, namely, non-carbonated soft drinks.	6/16/2008

5. Hershey also owns valid and subsisting common law rights to the TROPICAL TREMOR mark as a result of the continuous and exclusive use of this mark by its licensees throughout the United States to identify various products, including beverages such as soft drinks and punch.

6. Hershey, its predecessors in interest, and its licensees have made and continue to make substantial efforts and expenditures to advertise and promote their products, including beverages and related products, under the TROPICAL TREMOR mark. As a result, the TROPICAL TREMOR mark has become a valuable asset of Hershey, serving as a symbol for Hershey's goods and services and of the goodwill which is associated with those goods and services.

7. Despite Hershey's prior common law and statutory rights in the TROPICAL TREMOR mark, Applicant, with both constructive and actual notice of Hershey's federal registrations and its applications for both the TROPICAL TREMOR mark and the TREMOR mark, and after Hershey established rights in and to the TROPICAL TREMOR and TREMOR

marks, adopted and filed an application for registration of the mark ALLAN VOLCANIC TREMORS for goods in International Class 030, including “confectionery, namely, candy.”

8. Applicant’s ALLAN VOLCANIC TREMORS mark is highly similar to the TROPICAL TREMOR and TREMOR marks adopted and used, and intended to be used, by Opposers.

9. Applicant’s goods, as described in its application opposed herein, are or would be offered through the same or similar channels of trade to the same or similar customers or users as those goods rendered and intended to be rendered by Opposers under the TROPICAL TREMOR and TREMOR marks. Applicant’s goods and Hershey’s goods are also highly related.

Applicant is selling candy and, on information and belief, its candy product is offered in sour and/or tangy flavors. Hershey already uses its TROPICAL TREMOR mark in connection with a soft drink associated with the well-known JOLLY RANCHER trademark that is also used for candy, including hard candies with tangy and sour flavors. Furthermore, the marketing and selling of candy under Hershey’s TROPICAL TREMOR and TREMOR marks is a natural expansion of its beverage brands.

10. Opposers believe and therefore allege that use and registration of the mark covered by Application Serial No. 77/268,291 will damage Opposers, for the following reasons among others:

- a. that customers and purchasers of the respective goods and services would be confused, mistaken, or deceived as to the source and origin of Applicant’s goods rendered under the applied-for mark; and
- b. that customers and purchasers of the respective goods and services 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.

11. Applicant's applied-for mark so resembles Opposers' previously used and registered TROPICAL TREMOR mark as well the TREMOR mark that Opposer intends to use, 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).

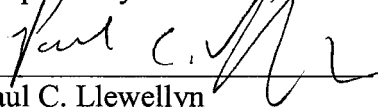
12. Applicant's applied-for mark so resembles Opposers' previously used and registered TROPICAL TREMOR mark as well the TREMOR mark that Opposer intends to use, as to be likely, when applied to the goods set forth in Applicant's application, to falsely suggest a connection with the Opposers within the meaning of 15 U.S.C. § 1052(a).

WHEREFORE, Opposers respectfully prays that this Opposition be sustained and that registration to Applicant be refused.

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.

New York, New York
Date: November 3, 2009

Respectfully submitted,



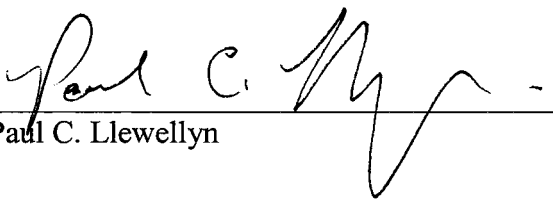
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Attorneys for Opposers

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2009, I caused the foregoing Notice of Opposition to be served by first class United States mail, postage prepaid, upon the following attorney of record for applicant:

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Paul C. Llewellyn