

ESTTA Tracking number: **ESTTA372410**

Filing date: **10/08/2010**

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	Top TM, LLC
Granted to Date of previous extension	10/13/2010
Address	4800 N. Federal Highway Suite B300 Boca Raton, FL 33431 UNITED STATES

Attorney information	Brad D. Rose Pryor Cashman LLP 7 Times Square New York, NY 10036 UNITED STATES mshine@pryorcashman.com, tlee@pryorcashman.com, tmurphy@pryorcashman.com
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**Applicant Information**

Application No	77460416	Publication date	06/15/2010
Opposition Filing Date	10/08/2010	Opposition Period Ends	10/13/2010
Applicant	Hero Nutritional Products, LLC. 991 Calle Negocio San Clemente, CA 92673 UNITED STATES		

**Goods/Services Affected by Opposition**


Class 005. First Use: 2008/01/08 First Use In Commerce: 2008/01/08  
All goods and services in the class are opposed, namely: Vitamins preparations; and nutritional and dietary supplements

**Grounds for Opposition**


False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

**Marks Cited by Opposer as Basis for Opposition**

U.S. Application No.	77953898	Application Date	03/09/2010
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	SMART FOR LIFE CARDIOVASCULAR COOKIE
Design Mark	
Description of Mark	NONE
Goods/Services	Class 029. First use: Staple foods for use in weight loss, namely, chicken stock, dairy-based dips, dips, excluding salsa and other sauces used as dips

U.S. Application No.	77953903	Application Date	03/09/2010
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	SMART FOR LIFE CARDIOVASCULAR COOKIE
Design Mark	
Description of Mark	NONE
Goods/Services	Class 030. First use: Staple foods for use in weight loss, namely, bakery goods, bakery products, cookies, chocolate-based ready-to-eat food bars, grain-based food bars, namely, oat-based snack bars, fruit barbeque sauce, candy, catsup, chocolate topping, chocolate syrup, dessert puddings, salad dressings, salad sauces, salsa, sauces, seasonings

U.S. Application No.	77953906	Application Date	03/09/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SMART FOR LIFE CARDIOVASCULAR COOKIE		

Design Mark	<p><b>SMART FOR LIFE</b>  <b>CARDIOVASCULAR COOKIE</b></p>
Description of Mark	NONE
Goods/Services	Class 044. First use: Weight loss services, namely, dietary and nutritional guidance, dietician services, food nutrition consultation, hypnotherapy services for weight loss, metabolic testing for nutraceutical needs, nutrition counseling, providing information about dietary supplements and nutrition, and weight reduction diet planning and supervision

Attachments	77953898#TMSN.jpeg ( 1 page )( bytes ) 77953903#TMSN.jpeg ( 1 page )( bytes ) 77953906#TMSN.jpeg ( 1 page )( bytes ) HERO N Opp.PDF ( 10 pages )(341449 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 Overnight Courier on this date.

Signature	/Brad D. Rose/
Name	Brad D. Rose
Date	10/08/2010

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

In the Matter of Trademark Application  
Serial No. 77/460,416 for the mark  
HERO NUTRITIONALS SLICE OF LIFE GUMMY VITAMINS FOR ADULTS  
NATURAL FRUIT FLAVORS *with Design*

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TOP TM, LLC,	:
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Opposer,	:
	:
-against-	:
	:
HERO NUTRITIONAL PRODUCTS, LLC,	:
	:
	:
Applicant.	:
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Opposition No.

In the matter of the Application of Hero Nutritional Products, LLC (hereinafter “HNP” or “Applicant”) for registration of the trademark HERO NUTRITIONALS SLICE OF LIFE GUMMY VITAMINS FOR ADULTS NATURAL FRUIT FLAVORS *with Design* (hereinafter “Mark”) which was published in the *Official Gazette* on June 15, 2010, Top TM, LLC (hereinafter “TTM” or “Opposer”), a limited liability company organized under the laws of the State of Florida, with its principal place of business at 4800 N. Federal Highway, Suite B300, Boca Raton, FL 33431, respectfully avers that it will be substantially and irreparably damaged by the registration of the alleged mark HERO NUTRITIONALS SLICE OF LIFE GUMMY VITAMINS FOR ADULTS NATURAL FRUIT FLAVORS *with Design* covering “vitamin preparations; and nutritional and dietary supplements” in cl. 5, as shown in Application Serial No. 77/460,416 (hereinafter “Application”). Accordingly, TTM hereby opposes the filing and registration of the Mark. As grounds for opposition, it is alleged that:

**Background on Opposition:**

1. Opposer is a health service company that is in the business of assisting its customers with the loss of weight and gain of health through proprietary dietary and nutritional products which have been developed and manufactured by Opposer's team of doctors, nutritionists, food scientists and bakers and subsequently marketed and offered for sale nationwide since at least August, 2006.

2. Opposer's top-rated SMART FOR LIFE CARDIOVASCULAR COOKIE weight loss program is a comprehensive weight management approach to health and wellness which utilizes natural, hunger-controlling diet foods to deliver visible results. The program which was created in August 2006 by Dr. Sasson Moulavi, a bariatric physician, is based on the principle of improving people's lives by providing quick, safe, easy and affordable means of weight control through in-person counseling including one-on-one medical supervision, in over forty (40) weight management centers nationwide.

3. As part of its weight loss program, Opposer requires that its customers purchase and consume its award winning, flavorsome, all natural and organic SMART FOR LIFE CARDIOVASCULAR COOKIE food products. Opposer's products are readily accessible for purchase all over the country in its weight management centers, through its website [www.smartforlife.com](http://www.smartforlife.com) and in numerous major national drugstore, supermarket and general merchandise retailer chains including but not limited to Costco, BJ's, Walgreens, Drugstore.com and Amazon.com.

4. As a result of the phenomenal success of Opposer's SMART FOR LIFE CARDIOVASCULAR COOKIE weight loss program and food products, Opposer and its the

SMART FOR LIFE CARDIOVASCULAR COOKIE branded goods and services have become a household name for hundreds of thousands of people all over the country seeking a healthy and balanced lifestyle.

5. Opposer has for over at least four (4) years expended substantial sums and significant resources over the years building, operating, advertising, promoting, protecting and expanding its SMART FOR LIFE CARDIOVASCULAR COOKIE branded goods and services by, *inter alia*, engaging a top 20 U.S. independent public relation agency and celebrity, actress, model and ABC's *Dancing With the Stars* co-host, Brooke Burke, as spokesperson for Opposer's brand. Furthermore, Opposer advertises and promotes its SMART FOR LIFE CARDIOVASCULAR COOKIE goods and services nationwide through [www.smartforlife.com](http://www.smartforlife.com), MySpace®, Twitter® and Facebook® pages and has received widespread national media attention, including but not limited to features in The Los Angeles Times, People Magazine, Women's World Magazine, Indianapolis Business News, Baking & Snack Magazine and Chatelaine Magazine.

6. To continue to reinforce its commitment in improving the country's health, Opposer, through its SMART FOR LIFE CARDIOVASCULAR COOKIE branded goods and services have sponsored and endorsed numerous health-related charitable events and youth camps such as the Unicorn Children's Foundation Event in Boca Raton, FL (May, 2010) and Brandon Flowers Youth Sports Camp in Boca Raton, FL (July, 2009).

**Opposer's Trademarks:**

7. In addition to Opposer's common law rights in and to the mark SMART FOR LIFE CARDIOVASCULAR COOKIE, its related company, U.S. Medical Care Holdings,

LLC, is the owner of the SMART FOR LIFE® Trademark (U.S. Trademark Registration Nos. 3,759,293 and 3,814,891), which has been in use in connection with pharmaceuticals, vitamins and dietary and nutritional supplements for use in weight loss in cl. 5, staple foods for use in weight loss in cls. 29 and 30 and weight loss services in cl. 44 since at least August, 2006. Opposer also owns the following pending federal trademark applications (hereinafter collectively referred to as the “SMART FOR LIFE Marks”):

MARK	APPLICATION SERIAL NO.	GOODS AND SERVICES
SMART FOR LIFE CARDIOVASCULAR COOKIE	77/953,898	Staple foods for use in weight loss, namely, chicken stock, dairy-based dips, dips, excluding salsa and other sauces used as dips, in cl. 29
SMART FOR LIFE CARDIOVASCULAR COOKIE	77/953,903	Staple foods for use in weight loss, namely bakery goods, bakery products, cookies, chocolate-based ready-to-eat food bars, grain-based food bars, namely, oat-based snack bars, fruit barbeque sauce, candy, catsup, chocolate topping, chocolate syrup, dessert puddings, salad dressings, salad sauces, salsa, sauces and seasonings, in cl. 30
SMART FOR LIFE CARDIOVASCULAR COOKIE	77/953,906	Weight loss services, namely, dietary and nutritional guidance, dietician services, food nutrition consultation, hypnotherapy services for weight loss, metabolic testing for nutraceutical needs, nutrition counseling, providing information about dietary supplements and nutrition, and weight reduction planning and supervision, in cl. 44

8. Opposer has continuously and substantially used the SMART FOR LIFE Marks in interstate commerce in connection with its goods and services since at least as early as August 2006.

9. Opposer's SMART FOR LIFE Marks have been in valid and continuous use since August 2006 and have not been abandoned.

10. Opposer's goods and services offered under the SMART FOR LIFE Marks have come to symbolize high quality in the eyes of the consuming public as a result of Opposer's exacting standards, its vigorous promotion throughout the years of the SMART FOR LIFE Marks and the publicity generated for the SMART FOR LIFE Marks through widespread media exposure. The SMART FOR LIFE Marks have become well known to the general public and in the trade, and have become distinctively and exclusively associated with Opposer and, as such, identify and distinguish the source and origin of Opposer's goods and services.

11. As a result of substantial sales and widespread promotion, Opposer has built up significant goodwill in the SMART FOR LIFE Marks.

**Applicant's Application:**

12. On April 29, 2008, almost two (2) years after Opposer had been using and marketing its SMART FOR LIFE Marks in commerce and gaining fame through substantial sales, opening numerous weight management centers across the country, receiving widespread media exposure (radio and print) and winning numerous awards, Applicant filed an application for the mark HERO NUTRITIONALS SLICE OF LIFE GUMMY VITAMINS FOR ADULTS



NATURAL FRUIT FLAVORS *with Design* covering “vitamin preparations; and nutritional and dietary supplements” in cl. 5 (hereinafter the “Application”).

13. In the Application, Applicant admitted that the date upon which Applicant first used the Mark in commerce was January 8, 2008 - well over a year after the date upon which Opposer first used the SMART FOR LIFE Marks on or in connection with its goods and services.

14. The dominant element of Applicant’s mark, namely the phrase “SLICE OF LIFE”, is confusingly similar in sound, appearance and commercial impression to Opposer’s SMART FOR LIFE Marks.

15. Significantly, Applicant is using its confusingly similar mark in connection with nutritional gummy candies – goods that are substantially similar to Opposer’s nutritional dietary cookies.

16. Given that both Opposer and Applicant are selling dietary and nutritional snacks, it can be expected that these snacks will be marketed and sold to the same types of consumers through the same or similar channels of trade. This increases the likelihood of consumer confusion.

17. Because the SMART FOR LIFE Marks are exclusively associated with Opposer’s goods and services, Applicant’s registration and use of the Mark will inevitably cause confusion in the minds of the public, thereby misleading the public to believe that Applicant’s goods emanate from Opposer or that Applicant is in some way associated with or connected to Opposer, when, in fact, no such relationship exists.

18. In sum, registration of Applicant's mark will likely cause considerable confusion, mistake and/or deception in view of the facts that:

- (i) Opposer's SMART FOR LIFE Marks have been in continuous use since at least as early as August 2006 and prior to Applicant's first use of the Mark;
- (ii) Opposer's SMART FOR LIFE Marks are distinctive;
- (iii) the goods applied for by Applicant are similar to the goods and services covered in Opposer's SMART FOR LIFE Marks and provided by Opposer under its distinctive SMART FOR LIFE Marks;
- (iv) Applicant's Mark is confusingly similar to Opposer's SMART FOR LIFE Marks; and
- (v) Applicant's Mark suggests an association with the SMART FOR LIFE Marks;

**WHEREFORE**, Opposer prays that the Application, Serial No. 77/460,416, be rejected and that the Mark therein sought for the goods therein specified in International Class 5 be denied and refused.

The fee of \$300.00 for opposition in cl. 5 has been paid electronically through ESTTA.

POWER OF ATTORNEY

Opposer hereby appoints Brad D. Rose, Teresa Lee, Nicole Kaplan, Philippe Zylberg and Muzamil A. Huq, members of the Bar of the State of New York, whose address is Pryor Cashman LLP, 7 Times Square, New York, New York 10036, (212) 421-4100, as its duly authorized agents and attorneys in this matter to prosecute this Opposition, to transact all business in the Patent and Trademark Office and in the United States Courts in connection with the Opposition, to sign their names to all papers which may be hereinafter filed in connection therewith and to receive all communications relating to same.

Dated: October 8, 2010

Respectfully submitted,

By: \_\_\_\_\_/bdr/

Brad D. Rose, Esq.

Teresa Lee, Esq.

Nicole E. Kaplan, Esq.

Pryor Cashman LLP

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New York, New York 10036

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Attorneys for Opposer, Top TM, LLC

**Certificate of Service by FEDEX**

I hereby certify that a true and correct copy of NOTICE OF OPPOSITION is being served by "FEDEX" and addressed to counsel of record for Opposer, on October 8, 2010 at the address listed below:

Paul N. Tauger, Esq.  
Hero Nutritionals LLC  
991 Calle Negocio  
San Clemente, CA 92673

Signed: 

Name: Moira Shine

Certificate of Service by TEAS

I hereby certify that this original NOTICE OF OPPOSITION is being filed with the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office at the address listed below, through ESTTA on October 8, 2010:

Commissioner for Trademarks

P.O. Box 1451

Alexandria, Virginia 22313-1451

**Attn: Trademark Trial and Appeal Board**

Signed: Maira Shine

Name: Moira Shine