

ESTTA Tracking number: **ESTTA376127**

Filing date: **11/01/2010**

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	KELLOGG NORTH AMERICA COMPANY
Granted to Date of previous extension	10/31/2010
Address	ONE KELLOGG SQUARE, PO BOX 3599 BATTLE CREEK, MI 49016-3599 UNITED STATES
Correspondence information	DAVID A HERDMAN ASSISTANT SECRETARY/CORPORATE COUNSEL KELLOGG NORTH AMERICA COMPANY ONE KELLOGG SQUARE, PO BOX 3599 BATTLE CREEK, MI 49016-3599 UNITED STATES trademarks@kellogg.com Phone:269-961-2170

Applicant Information

Application No	77886225	Publication date	05/04/2010
Opposition Filing Date	11/01/2010	Opposition Period Ends	10/31/2010
Applicant	Promotion In Motion, Inc. 3 Reuten Drive Closter, NJ 07624 UNITED STATES		

Goods/Services Affected by Opposition


Class 029. All goods and services in the class are opposed, namely: PROCESSED FRUIT SNACKS MADE FROM FRUIT JUICE AND/OR FRUIT PUREE; FRUIT BASED SNACK FOODS, NAMELY, FRUIT ROLLS; FRUIT BARS, NAMELY, PROCESSED FRUIT BASED FOOD BARS; FRUIT BASED SNACK FOODS COMPRISED OF FRUIT COMPONENTS; FRUIT BASED SNACK FOODS COMPRISED OF FRUIT AND YOGURT COMPONENTS; FRUIT BASED SNACK FOODS COMPRISED OF FRUIT AND GRANOLA COMPONENTS; AND FRUIT BASED SNACK FOODS COMPRISED OF FRUIT, YOGURT AND GRANOLA COMPONENTS
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Grounds for Opposition

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. Registration	3221846	Application Date	11/07/2005
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No.			
Registration Date	03/27/2007	Foreign Priority Date	NONE
Word Mark	NONE		
Design Mark			
Description of Mark	The mark consists of a smiling, humanized sun design.		
Goods/Services	Class 041. First use: First Use: 1998/05/29 First Use In Commerce: 1998/05/29 Museum and entertainment attraction services encompassing the following features and activities-- a glockenspiel, displays and films concerning Battle Creek, the cereal industry, including a simulated cereal production line and advertising and entertainment relating to the cereal industry; a children's play area; an interactive computerized trivia contest and various art exhibits and hands on projects relating to cartoon character drawing skills		

U.S. Registration No.	3534060	Application Date	05/07/2008
Registration Date	11/18/2008	Foreign Priority Date	NONE
Word Mark	NONE		
Design Mark			
Description of Mark	The mark consists of an anthropomorphic depiction of a smiling sun in the color yellow with black pupils holding two small shovels containing brown raisins.		
Goods/Services	Class 030. First use: First Use: 1999/01/04 First Use In Commerce: 1999/01/04 Processed cereal-based food to be used as a breakfast food, snack food or ingredient for making other foods		

Attachments	78748818#TMSN.jpeg (1 page)(bytes) 77467721#TMSN.jpeg (1 page)(bytes) SUNNY FRUITS Opposition Notice Scan.pdf (6 pages)(252505 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	/DAVID A HERDMAN/
Name	DAVID A HERDMAN
Date	11/01/2010

**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. 77/886,225
PROMOTION IN MOTION, INC.)	Mark: SUNNY FRUITS
)	Filing Date: December 4, 2009
Applicant.)	Publication Date: May 4, 2010
)	
)	

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. 77/886,225 in International Class 29, filed by Promotion In Motion, Inc. (hereinafter "Applicant") on December 4, 2009, and opposes Application Serial No. 77/886,225.

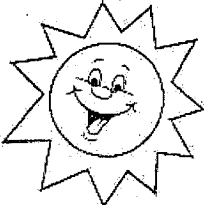
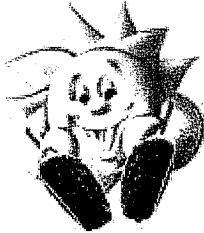
The grounds are as follows:

1. Commencing long prior to Applicant's filing date, Opposer and Opposer's predecessor in interest and licensee, Kellogg Company, have engaged, and are now engaged in the manufacture, distribution, sale, advertising and promotion in interstate commerce of food products, including processed cereals and snack foods, including fruit snacks, as well as a wide range of promotional and licensed goods and services.

2. Commencing long prior to Applicant's filing date, Opposer and Opposer's predecessor in interest have used, and Opposer is now using Opposer's SUN DESIGN trademarks, also known by the character's name, "Sunny" (hereinafter referred to as "Opposer's Marks"), and the description "Smiling Sun design," in connection with the sale, advertising and

promotion of said food products distributed and sold by Opposer in commerce, especially in connection with Opposer's KELLOGG'S RAISIN BRAN and RAISIN BRAN CRUNCH brands.

3. Opposer, is owner of, and will rely herein, upon the following Federal Trademark registrations:

Mark	Registration No.	Issue Date	Goods
<p>SUN Design ("Sunny")</p> 	3221846	03/27/2007	Class 41- Museum and entertainment attraction services encompassing the following features and activities-- a glockenspiel, displays and films concerning Battle Creek, the cereal industry, including a simulated cereal production line and advertising and entertainment relating to the cereal industry; a children's play area; an interactive computerized trivia contest and various art exhibits and hands on projects relating to cartoon character drawing skills
<p>SUNNY & TWO SCOOPS Design</p> 	3534060	11/18/2008	Processed cereal-based food to be used as a breakfast food, snack food or ingredient for making other foods

(hereinafter referred to as "Opposer's Registered Marks"). These registrations are, in all respects, valid, subsisting and owned by Opposer and are conclusive evidence of Opposer's exclusive right to use the marks covered by such registrations in commerce on the goods set forth in such registrations.

4. In addition to Opposer's Registered Marks and Opposer's Marks above, Opposer has extensive common law rights in the SUN Design and SUNNY marks for many other and various promotional and licensed products and services in connection with the same or closely related goods. Together, the common law rights, Opposer's Registered Marks and Opposer's Marks are referred to herein as "Opposer's SUN Marks").

5. Commencing long prior to Applicant's filing date in connection with Opposer's very substantial and expanding licensing business, Opposer and Opposer's predecessor in interest have used Opposer's SUN Marks on a wide range of licensed and promotional products, including towels, clothing, toys, games and sporting goods, as well as on Opposer's internet pages and on packaging of cereal products identified by Opposer's SUN trademarks promoting Opposer's cookie recipes.

6. Opposer has made substantial investment in advertising and promoting its goods and services under Opposer's SUN Marks since their initial use many years ago. Opposer has extensively used, advertised, promoted and offered Opposer's goods and services bearing Opposer's SUN Marks to the public through various channels of trade in commerce, including in connection with its NASCAR auto racing sponsorship and related licensed goods and the Kellogg's Cereal City USA museum and web site, with the result that Opposer's customers and the public in general have come to know and recognize Opposer's SUN Marks and associate the same with Opposer and/or the goods and/or services sold or provided by Opposer or its controlled licensees.

7. Given the extensive promotion of Opposer's SUN Marks and the favorable public recognition of Opposer's SUN marks, use on these other licensed and promotional products is a natural extension of Opposer's earlier and continuing usage on food products.

8. Owing to its continuous use for over many years in connection with cereal breakfast food and the sale of millions of boxes of cereal, many of which bear Opposer's SUN Marks, Opposer's SUN Marks are famous and distinctive marks in the United States as used on cereal-based food products. Opposer's SUN Marks became famous and distinctive well prior to the filing of this Applicant's application and well prior to Applicant's actual use or intended use of Applicant's mark.

9. Upon information and belief, notwithstanding Opposer's rights in and to Opposer's SUN Marks and the SUNNY name, on December 4, 2009, Applicant filed an application for registration of the alleged SUNNY FRUITS trademark for "processed fruit snacks made from fruit juice and/or fruit puree; fruit based snack foods, namely, fruit rolls; fruit bars, namely, processed fruit based food bars; fruit based snack foods comprised of fruit components; fruit based snack foods comprised of fruit and yogurt components; fruit based snack foods comprised of fruit and granola components; and fruit based snack foods comprised of fruit, yogurt and granola components" in International Class 29. Said application was assigned Serial No. 77/886,225 and was published for Opposition in the Official Gazette of May 4, 2010.

10. Applicant's SUNNY FRUITS mark so resembles Opposer's SUN Marks as to be likely, when applied to the proposed goods of Applicant, to cause confusion or mistake or to deceive purchasers resulting in damage and detriment of Opposer and its reputation.

11. Opposer, upon information and belief, avers that its 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 alleged SUNNY FRUITS mark and misled into believing that the goods so identified in the application emanate from, or are

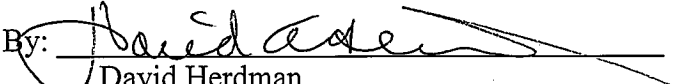
licensed by or are in some other way directly or indirectly associated with Opposer, to the damage and detriment of Opposer and its reputation.

12. Opposer, upon information and belief, avers that it will be damaged by the registration by Applicant of the alleged SUNNY FRUITS mark, as set forth in Applicant's Trademark Application Serial No. 77/886,225, in that the mark is substantially similar to Opposer's marks and common law rights and will be used in connection with goods identical to and/or closely related to the goods and services offered to the public by Opposer and its controlled licensees.

13. Opposer, upon information and belief, also avers that it will be damaged by the registration by Applicant of the proposed SUNNY FRUITS mark, as set forth in Applicant's Trademark Application Serial No. 77/886,225, in that the alleged mark will dilute the distinctiveness of Opposer's famous SUN Marks within the meaning of the provisions of the Federal Trademark Dilution Act of 1995, as amended by the Trademark Revision Act of 2006.

Wherefore, this Opposer, Kellogg North America Company believes and avers that it will be damaged by registration of alleged SUNNY FRUITS trademark as aforesaid, and prays that said Application Serial No. 77/886,225 be rejected, 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: 
David Herdman

Assistant Secretary and Corporate Counsel
Kellogg North America Company
One Kellogg Square, P.O. Box 3599
Battle Creek, MI 49016-3599

Date: November 1, 2010


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. 77/886,225
PROMOTION IN MOTION, INC.)	Mark: SUNNY FRUITS
)	Filing Date: December 4, 2009
Applicant.)	Publication Date: May 4, 2010
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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 as listed on the TARR website of the United States Patent and Trademark Office by mailing said copy on November 1, 2010, via First Class Mail, postage prepaid to:

Richard M. Goldberg
25 East Salem Street, Suite 419
Hackensack, NJ 07601-7416



Patricia A. Conor