

ESTTA Tracking number: **ESTTA498007**

Filing date: **10/03/2012**

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	10/03/2012
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	85513987	Publication date	06/05/2012
Opposition Filing Date	10/03/2012	Opposition Period Ends	10/03/2012
Applicant	Kona Ice, Inc. 5945 Centennial Circle Florence, KY 41042 UNITED STATES		

Goods/Services Affected by Opposition


Class 030. First Use: 2009/03/01 First Use In Commerce: 2009/03/01
All goods and services in the class are opposed, namely: Flavored ices

Grounds for Opposition

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.	3221846	Application Date	11/07/2005
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
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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) SUN DESIGN Opposition Notice Scan.pdf (6 pages)(258350 bytes)
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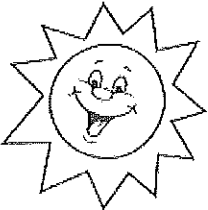
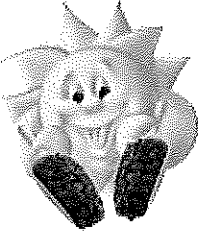
Certificate of Service

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	10/03/2012

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	Reg. No.	Issue Date	Goods
SUN Design ("Sunny") 	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
SUNNY & TWO SCOOPS Design 	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 subsisting registrations owned by Opposer are presumptive 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 SMILING SUN Design and SUNNY Word marks for food products that are related to Applicant's claimed goods.

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 Registered Marks, Opposer's Marks and Opposer's common law rights 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 SUNNY and SMILING SUN Design trademarks promoting Opposer's cookie recipes, all of which expand the renown of Opposer's Marks. Together, the common law rights, Opposer's Registered Marks and Opposer's Marks are referred to herein as "Opposer's SMILING SUN Marks".

6. Opposer has made substantial investment in advertising and promoting its goods and services under Opposer's SMILING SUN Marks since their initial use more than forty (40) years ago. Opposer has extensively used, advertised, promoted and offered Opposer's goods and services bearing Opposer's SMILING SUN to the public through various channels of trade in commerce, including on tens of millions of boxes of cereal as well as in connection with its NASCAR auto racing sponsorship and related licensed goods and services and the former Kellogg's Cereal City USA museum and web site, as well as appearances on Opposer's continuing e-store site, Kellogg'sStore.com, with the result that Opposer's customers and the public in general have come to know and recognize Opposer's SMILING SUN 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 SMILING SUN Marks and the favorable public recognition of Opposer's SMILING 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. Upon information and belief, notwithstanding Opposer's rights in and to Opposer's marks comprising the SMILING SUN Design and the SUNNY name, Applicant filed an application for a humanized, smiling sun design for "Flavored ices" in International Class 30. Said application was assigned Application Serial No. 85/091,795 and was published for Opposition in the *Official Gazette* on June 5, 2012.

9. Applicant's SUN DESIGN Mark so resembles Opposer's SMILING SUN Marks as to be likely, when applied to the claimed goods of Applicant, which are related to Opposer's goods, to cause confusion or mistake or to deceive purchasers resulting in damage and detriment of Opposer and its reputation.

10. 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 SUN DESIGN Mark and misled into believing that the goods so identified in the application emanate from, or are licensed by or in some other way directly or indirectly associated with Opposer, to the damage and detriment of Opposer and its reputation.

11. Opposer, upon information and belief, avers that it will be damaged by the registration by Applicant of the alleged Applicant's SUN DESIGN Mark, as set forth in Applicant's Trademark Application Serial No. 85/513,987, in that mark incorporates the essence of Opposer's well-known common law trademark of the depiction of a humanized SMILING

SUN DESIGN, and will be used in connection with goods competitive with or closely related to the primary goods offered to the public by Opposer.

Wherefore, this Opposer, Kellogg North America Company believes and avers that it will be damaged by registration of Applicant's alleged SUN DESIGN Mark as aforesaid, and prays that said Application Serial No. 85/513,987 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: October 3, 2012

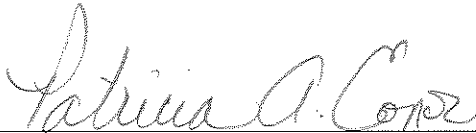
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

KELLOGG NORTH AMERICA COMPANY)	
)	
Opposer,)	
)	
v.)	Opposition No. _____
)	Serial No. 85/513,987
KONA ICE, INC.)	Mark: SUN DESIGN
)	Filing Date: January 11, 2012
Applicant.)	Publication Date: June 5, 2012
)	

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 TSDR database of the United States Patent and Trademark Office by mailing said copy on October 3, 2012, via First Class Mail, postage prepaid to:

Clay A. Griffith
Arnold & Griffith, PLC
328 Thomas More Pkwy
Crestview Hills, KY 41017-3488



Patricia A. Conor