

ESTTA Tracking number: **ESTTA506294**

Filing date: **11/19/2012**

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	11/18/2012
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	85528263	Publication date	05/22/2012
Opposition Filing Date	11/19/2012	Opposition Period Ends	11/18/2012
Applicant	BARILLA G.E R. FRATELLI - SOCIETÀ# PER AZIONI Via Mantova 166 Parma, 43100 ITALY		

**Goods/Services Affected by Opposition**

Class 030. All goods and services in the class are opposed, namely: sauce, salad dressings, food seasonings, seasoning mixes, seasonings, prepared and/or packaged foods, dishes, meals, meal kits, and microwaveable foods consisting primarily of rice, bread, cereals, noodles, ready-made sauces and/or pastries; snacks made from cereals, biscuits, crackers, rusks, breadsticks, dry breads; pizza; calzones; panini sandwiches; stromboli; ravioli; tortellini; manicotti; pasta shells; lasagna
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**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.	1255456	Application Date	02/27/1981
Registration Date	10/25/1983	Foreign Priority Date	NONE


Word Mark	NUTRI-GRAIN
Design Mark	
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 1981/01/27 First Use In Commerce: 1981/01/27 Cereal-Derived Food Product to Be Used as a Breakfast Food, Snack Food or Ingredient for Making Food

U.S. Registration No.	1367960	Application Date	04/02/1985
Registration Date	10/29/1985	Foreign Priority Date	NONE
Word Mark	NUTRI-GRAIN		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1984/12/18 First Use In Commerce: 1984/12/18 WAFFLES		

U.S. Registration No.	3389446	Application Date	10/14/2006
Registration Date	02/26/2008	Foreign Priority Date	NONE
Word Mark	NUTRI-GRAIN		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2007/01/02 First Use In Commerce: 2007/01/02 Fruit and nut based snack bars		

U.S. Registration No.	3534053	Application Date	04/30/2008
Registration Date	11/18/2008	Foreign Priority Date	NONE
Word Mark	NUTRI-GRAIN		

Design Mark	
Description of Mark	The mark consists of the words "NUTRI-GRAIN" in blue with a shadow effect and an inside line in the color gold. The "i" in "Grain" is dotted with a stylized depiction of a wheat grain stalk in the color gold.
Goods/Services	Class 030. First use: First Use: 2001/10/00 First Use In Commerce: 2001/10/00 cereal-based snack food bars and cereal-derived food product to be used as a snack food; cereal-based food bars containing yogurt; pancakes; waffles

U.S. Registration No.	4126447	Application Date	12/21/2010
Registration Date	04/10/2012	Foreign Priority Date	NONE
Word Mark	NUTRI-GRAIN FRUIT FUSION		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2011/04/00 First Use In Commerce: 2011/04/00 GRAIN-BASED SNACK FOOD BAR; GRAIN-BASED SNACK FOOD BAR ALSO CONTAINING FRUIT; CEREAL-BASED SNACK FOOD BAR		

Attachments	77021308#TMSN.jpeg ( 1 page )( bytes ) 77462062#TMSN.jpeg ( 1 page )( bytes ) 85203009#TMSN.jpeg ( 1 page )( bytes ) NUTRIPLUS Opposition Notice Scan.pdf ( 7 pages )(284510 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	11/19/2012

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

<b>KELLOGG NORTH AMERICA COMPANY</b>	)	
	)	
Opposer,	)	
	)	
v.	)	
	)	Opposition No. _____
	)	Serial No. 85/528,263
<b>BARILLA G.E.R. FRATELLI SPA</b>	)	Mark: NUTRIPLUS
	)	Filing Date: January 30, 2012
Applicant.	)	Publication Date: May 22, 2012
	)	

**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 NUTRIPLUS of Application Serial No. 85/528,263 in International Class 30, filed by Barilla G.E.R. Fratelli SpA, a joint stock company formed under the laws of Italy (hereinafter "Applicant") on January 30, 2012, and opposes Application Serial No. 85/528,263. In addition, Applicant has filed for the NUTRIPLUS mark for goods in International Class 29 that are not at issue with respect to these proceedings.

The grounds for this opposition are as follows:

1. Commencing long prior to Applicant's filing date, Opposer and Opposer's predecessor in interest, Kellogg Company, have engaged, and Opposer is now engaged in the manufacture, distribution, sale, advertising and promotion in interstate commerce of a wide range of food products, including various types of cereal and/or cereal- and grain-based food products, including breakfast cereals and snack foods, including cereal and/or grain-based food

bars, and have more recently expanded into other, related categories, including meal replacement bars.

2. Commencing long prior to Applicant's filing date, Opposer and Opposer's predecessor in interest, Kellogg Company, have used, and Opposer is now using Opposer's NUTRI-GRAIN trademarks (hereinafter sometimes referred to as "Opposer's Marks") in connection with healthy food products, including cereal and/or grain-based snack food bars, waffles and cereal and/or grain-derived food products to be used as breakfast food or snack food distributed and sold by Opposer in commerce. Additionally, for a number of years prior to any other uses, Opposer used the NUTRI-GRAIN mark very extensively on a line of several types of ready to eat breakfast cereals, which are still commercialized under the mark in several important international markets and are thus promoted on the internet, which is accessible in all markets, as well as more recently on granola chewy bites, muffin bars, yogurt bars, pancakes and a two chambered cereal bar marketed under the mark NUTRI-GRAIN TWISTS.

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

<b>Mark</b>	<b>Registration No.</b>	<b>Issue Date</b>	<b>Goods</b>
NUTRI-GRAIN	1,255,456	10/25/1983	Cereal-derived food product to be used as a breakfast food, snack food or ingredient for making food
NUTRI-GRAIN	1,367,960	10/29/1985	Waffles
NUTRI-GRAIN	3,389,446	02/26/2008	Fruit and nut based snack bars

<b>Mark</b>	<b>Registration No.</b>	<b>Issue Date</b>	<b>Goods</b>
NUTRI-GRAIN & Design	3,534,053	11/18/2008	cereal-based snack food bars and cereal-derived food product to be used as a snack food; cereal-based food bars containing yogurt; pancakes; waffles
NUTRI-GRAIN FRUIT FUSION	4,126,447	04/10/2012	Grain-based snack food bar; Grain-based snack food bar also containing fruit; Cereal-base snack food bar

(hereinafter sometimes referred to as “Opposer’s Registered Marks”). Registration of Opposer’s Registered Marks is valid, subsisting and conclusive evidence of Opposer’s exclusive right to use Opposer’s Registered Marks in commerce on the goods specified in said registrations.

4. In addition to Opposer’s Marks and Opposer’s Registered Marks specified above, Opposer shall rely herein upon its common law usage of Opposer’s other NUTRI-GRAIN marks for its core products as well as related goods and other various promotional and licensed products and uses (hereinafter sometimes referred to as “Opposer’s Common Law Marks”). Together Opposer’s Marks, Opposer’s Registered Marks and Opposer’s Common Law Marks are hereafter referred to as Opposer’s NUTRI-GRAIN Marks.”

5. Opposer has made substantial investment in advertising and promoting its goods under Opposer’s NUTRI-GRAIN Marks since their initial use. Opposer has extensively used, advertised, promoted and offered Opposer’s healthy snack foods bearing Opposer’s NUTRI-GRAIN Marks to the public through various channels of trade in commerce with the result that Opposer’s customers and the public in general have come to know and recognize Opposer’s NUTRI-GRAIN Marks and associate the same with Opposer and/or goods sold by Opposer.

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

7. Upon information and belief, notwithstanding Opposer's rights in and to Opposer's NUTRI-GRAIN Marks, on January 30, 2012, Applicant filed an Intent-to-Use application for registration of the proposed NUTRIPLUS Mark for "sauce, salad dressings, food seasonings, seasoning mixes, seasonings, prepared and/or packaged foods, dishes, meals, meal kits, and microwaveable foods consisting primarily of rice, bread, cereals, noodles, ready-made sauces and/or pastries; snacks made from cereals, biscuits, crackers, rusks, breadsticks, dry breads; pizza; calzones; panini sandwiches; stromboli; ravioli; tortellini; manicotti; pasta shells; lasagna" in International Class 30. Said application was assigned Serial No. 85/528,263. In addition, Applicant has filed for the NUTRIPLUS mark for goods in International Class 29 that are not at issue with respect to these proceedings.

8. Applicant's NUTRIPLUS Mark so resembles Opposer's NUTRI-GRAIN Marks as to be likely to cause confusion or mistake or to deceive purchasers resulting in damage and detriment to Opposer and its reputation. In this regard, it is noted that the dominant initial portion of the marks are identical and the following portions of each mark GRAIN and PLUS are clearly less distinctive of the goods. Furthermore, Opposer has itself used "Plus" as a suffix in some of its own brands, such as its "FiberPlus" line of cereal-based food products.

9. Opposer, upon information and belief, avers that its customers, and the public generally, 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 NUTRIPLUS Mark and

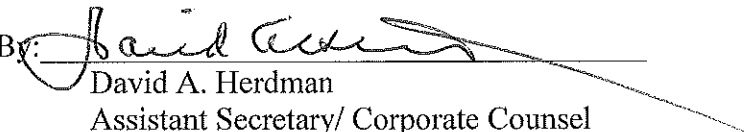


misled into believing that such goods emanate from, or are licensed to or are in some way directly or indirectly associated with Opposer, to the detriment of Opposer and its reputation.

10. Opposer, upon information and belief, avers that it will be damaged by the registration by Applicant of the alleged NUTRIPLUS Mark, as set forth in Applicant's Trademark Application Serial No. 85/528,263, in that the mark is substantially similar to Opposer's NUTRI-GRAIN Marks, and, in the case of "cereals" and "snacks made from cereals" and other similar goods in Class 30, Applicant's NUTRIPLUS Mark will be used in connection with the sale and advertising of food products that are either directly competitive with or closely related to Opposer's goods. Given the closely related or directly competitive nature of the products at issue, consumers could easily infer that the alleged NUTRIPLUS Mark branded goods were either an extension of Opposer's goods or that Opposer had licensed Applicant's use of this name.

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 NUTRIPLUS Mark as aforesaid, and prays that said Application Serial No. 85/528,263 be rejected with respect to the goods in International Class 30 in connection with said application, that no registration be issued thereon to Applicant with respect to said application, and that this Opposition be sustained in favor of Opposer.

Respectfully Submitted,  
KELLOGG NORTH AMERICA COMPANY

By:   
David A. Herdman  
Assistant Secretary/ Corporate Counsel  
Kellogg North America Company  
One Kellogg Square  
P.O. Box 3599  
Battle Creek, MI 49016

Date: November 19, 2012

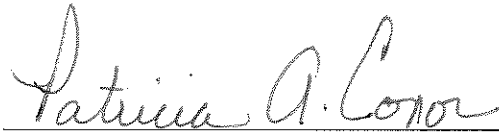
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	)	Filing Date: January 30, 2012
Applicant.	)	Publication Date: May 22, 2012
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Notice of Opposition has been served on the following Attorney of Record and Correspondent listed on the website of the United States Patent and Trademark Office by mailing said copy on November 19, 2012, via First Class Mail, postage prepaid to:

Adam Sacharoff  
Much Shelist  
191 North Wacker Drive, Suite 1800  
Chicago, IL 60606-16311



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Patricia A. Conor

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