

ESTTA Tracking number: **ESTTA1064976**

Filing date: **06/29/2020**

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	Frito-Lay North America, Inc.
Granted to Date of previous extension	06/28/2020
Address	7701 LEGACY DRIVE PLANO, TX 75024 UNITED STATES

Correspondence information	JEANETTE S. ZIMMER Senior Trademark Counsel FRITO-LAY NORTH AMERICA, INC. 7701 LEGACY DRIVE PLANO, TX 75024 UNITED STATES trademarks@pepsico.com, jeanette.zimmer@pepsico.com, donna.j.sanders@pepsico.com no phone number provided
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Applicant Information

Application No	86762942	Publication date	12/31/2019
Opposition Filing Date	06/29/2020	Opposition Period Ends	06/28/2020
Applicant	Biery Cheese Co. 6544 Paris Avenue, N. E. Louisville, OH 446419593 UNITED STATES		

Goods/Services Affected by Opposition


Class 029. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Cheese; cheese and cracker combinations; and food package combinations consisting primarily of cheese and meat

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
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Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	5329886	Application Date	06/24/2011
Registration Date	11/07/2017	Foreign Priority	NONE

		Date	
Word Mark	ALWAYS A PART OF GAME DAY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2017/09/15 First Use In Commerce: 2017/09/15 Dips; Potato-based snack foods Class 030. First use: First Use: 2017/09/15 First Use In Commerce: 2017/09/15 Cheese-flavored corn snacks; Corn-basedsnack foods; Salsa		

Attachments	85355812#TMSN.png(bytes) NOO Biery Cheese GAME DAY ivo LOC ALWAYS A PART OF GAME reg and common law use of GAME DAY slogans.pdf(730872 bytes)
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Signature	/Jeanette S. Zimmer/
Name	JEANETTE S. ZIMMER
Date	06/29/2020

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

IN THE MATTER OF APPLICATION

Mark : GAME DAY
Applicant : Biery Cheese Co.
Serial No. : 86/762,942
Filed : September 21, 2015
Published in the
Official Gazette : December 31, 2019

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FRITO-LAY NORTH AMERICA, INC. :
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Opposer, :
:
v. : Opposition No. _____
:
BIERY CHEESE CO. :
:
Applicant. :
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NOTICE OF OPPOSITION

Opposer, Frito-Lay North America, Inc. (“Frito-Lay” or “Opposer”), a Delaware corporation having a place of business at 7701 Legacy Drive, Plano, Texas 75024, believes that it will be damaged by the registration of United States Trademark Application Serial No. 86/762,942, filed on September 21, 2015, in the name of Biery Cheese Co. (hereinafter “Applicant”) for the mark GAME DAY based on an intent to use the mark in connection with “Cheese; cheese and cracker combinations; and food package combinations consisting primarily of cheese and meat” in International Class 29, and having been previously granted extensions of time to oppose, hereby opposes the foregoing application.

The specific grounds for this opposition are as follows:

1. Frito-Lay, through its predecessors-in-interest and title, and through its related companies, divisions and/or licensees has been engaged in the snack food business for well over 50 years and has become well and favorably known to members of the public, as well as to members of the snack food industry, for producing and selling a wide variety of high quality snack food products. Among other snacks, it sells crackers, potato chips, tortilla chips, corn chips, dairy-based dips and salsa, popcorn, pita chips, nuts and pretzels.

2. Frito-Lay and its parent company, PepsiCo, Inc., sponsor, or have sponsored, various sports leagues, including the National Football League, Major League Baseball, National Basketball Association, National Hockey League as well as numerous college teams.

3. On information and belief, sports leagues, television and the general consuming public commonly use the expression “game day” to refer to the day of a sports event.

4. For many years, Frito-Lay has used throughout the United States slogans that include the wording GAME DAY in connection with a variety of snack food products (hereinafter, the “GAME DAY Slogans”).

5. Opposer's snack food products are marketed and sold in vast quantities across the United States and in many countries around the world and are supported by millions of dollars of advertising and promotion each year.

6. Opposer's advertising and point-of-sale materials for snack food products often include GAME DAY Slogans and are displayed in virtually all supermarkets in the United States as well as in mass merchandise stores, convenience stores, vending machines, online and in other outlets.

7. The extensive commercial success of Opposer's snack food products is

partially due to the marketing efforts of Frito-Lay, including promoting its products with GAME DAY Slogans to encourage consumers to purchase and enjoy its products while watching sports events on “game day.”

8. Frito-Lay also maintains a strong internet presence through which it markets, advertises and promotes its products. Frito-Lay’s websites include www.fritolay.com which is operational twenty-four hours a day, seven days a week. Frito-Lay also maintains an active social media presence on sites such as Facebook, Twitter and YouTube that promote these products.

9. In addition to its prior common law rights, Opposer is also the owner of United States Trademark Registration Number 5,329,886 for the mark ALWAYS A PART OF GAME DAY, which registered on November 7, 2017, for “Dips; Potato-based snack foods” in International Class 29, and “Cheese-flavored corn snacks; Corn-based snack foods; Salsa” in International Class 30, both of which were first used in commerce by September 15, 2017.

10. Opposer’s registration for ALWAYS A PART OF GAME DAY is valid, subsisting, in full force and effect, un-cancelled and unrevoked, and serve as evidence of Opposer’s exclusive right to use this mark in commerce on or in connection with the goods identified in the registration, as provided by Section 33(a) of the United States Trademark (Lanham) Act, 15 U.S.C. Section 1115(a).

11. On information and belief, on September 21, 2015, Applicant, Biery Cheese Co., having a place of business at 6544 Paris Avenue, N. E., Louisville, Ohio 44641-9593, filed Application Serial No. 86/762,942 to register GAME DAY based on an intent to use the mark in connection with “Cheese; cheese and cracker combinations; and food package combinations consisting primarily of cheese and meat” in International Class 29 (the “Application”).

12. Upon information and belief, at the time Applicant filed the Application for GAME DAY, it was or should have been fully aware of Frito-Lay's common law rights, and at a minimum, Applicant had constructive notice of Frito-Lay's prior exclusive rights as a result of its active federal trademark registration for ALWAYS A PART OF GAME DAY.

13. Upon information and belief, Applicant was in fact aware of Frito-Lay's ALWAYS A PART OF GAME DAY registration because the United States Patent & Trademark Office cited Frito-Lay's ALWAYS A PART OF GAME DAY registration against the Application.

14. Applicant's GAME DAY mark and Frito-Lay's GAME DAY Slogans and ALWAYS A PART OF GAME DAY registration all contain the identical words of GAME DAY; therefore, the marks are confusingly similar in sight, sound and meaning.

15. On information and belief, the goods in connection with which Applicant's mark intends to be used and the goods in connection with which Frito-Lay's GAME DAY Slogans and ALWAYS A PART OF GAME DAY are used are similar, complementary and/or related.

16. Opposer has priority over Applicant because Opposer's use, application filing date and/or registration date for its GAME DAY Slogans and ALWAYS A PART OF GAME DAY registration all precede Applicant's filing date for its application-at-issue and/or any alleged date of first use of Applicant's GAME DAY mark.

17. Registration of Applicant's mark, which is the subject of the application-in-opposition, is barred by the provisions of Section 2(d) of the Trademark Act of 1946 because the mark consists of or comprises a mark which so resembles Frito-Lay's GAME DAY Slogans and ALWAYS A PART OF GAME DAY mark, which have been in use and are also the subject of a prior registration or previously filed application to register

a mark in the United States Patent and Trademark Office, as to be likely, when used in connection with the alleged goods of the Applicant, to cause confusion, mistake or deception.

18. Applicant's alleged mark resembles Opposer's previously used and/or registered marks as to be likely to cause confusion, to cause mistake or to deceive with consequent injury to Opposer because: (a) persons are likely to believe that the source of Applicant's goods/products is Opposer; or (b) that Applicant's mark or products are in some way legitimately connected or affiliated with, sponsored, approved, endorsed or licensed by Opposer when, in fact, they are not.

19. Frito-Lay will be damaged by the issuance of a registration sought by Applicant within the meaning of 15 U.S.C. Section 1063 because such registration would support and assist Applicant in the confusing, misleading, deceptive and/or dilutive use of Applicant's alleged GAME DAY mark, and would give color of exclusive statutory rights to Applicant in violation and derogation of the prior and superior rights of Frito-Lay.

WHEREFORE, Opposer prays that this opposition be sustained entirely in its favor, that registration be denied to Applicant on its Application Serial No. 86/762,942 and that the Board grant all further relief to Opposer that is necessary and just under these circumstances.

Respectfully submitted,

FRITO-LAY NORTH AMERICA, INC.

Date: June 29, 2020

By:


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