

ESTTA Tracking number: **ESTTA1288724**

Filing date: **06/01/2023**

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	Wise Foods, Inc.
Granted to date of previous extension	06/17/2023
Address	228 RASELEY STREET BERWICK, PA 18603 UNITED STATES
Attorney information	PETER G. PAPPAS EVERSHEDS SUTHERLAND (US) LLP 999 PEACHTREE STREET NE SUITE 2300 ATLANTA, GA 30309 UNITED STATES Primary email: petepappas@eversheds-sutherland.com Secondary email(s): chancellorshafor@eversheds-sutherland.us, patentdocket@eversheds-sutherland.com, trademarkclients@eversheds-sutherland.com, ipdocketingmailbox@eversheds-sutherland.com 4048538064
Docket no.	35389-0183

Applicant information

Application no.	97430701	Publication date	04/18/2023
Opposition filing date	06/01/2023	Opposition period ends	06/17/2023
Applicant	WMK Holdings, Inc. SUITE 101 103 FOULK ROAD WILMINGTON, DE 19803 UNITED STATES		

Goods/services affected by opposition

Class 030. First Use: None First Use In Commerce: None
All goods and services in the class are opposed, namely: SOFT PRETZELS

Grounds for opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
Geographic indication which, if used on or in connection with wine or spirits, identifies a place other than the origin of the goods	Trademark Act Section 2(a)

Marks cited by opposer as basis for opposition

U.S. registration no.	2054967	Application date	04/19/1996
Register	Principal		
Registration date	04/22/1997	Foreign priority date	NONE
Word mark	WISE CHOICE		
Design mark			
Description of mark	NONE		
Goods/services	Class 029. First use: First Use: Jan 5, 1989 First Use In Commerce: Jan 5, 1989 "potato chips" Class 030. First use: First Use: Jan 21, 1989 First Use In Commerce: Jan 21, 1989 "popped popcorn, corn chips, tortilla chips, cheese flavored baked corn puffs and pretzels"		

U.S. registration no.	0705034	Application date	01/12/1960
Register	Principal		
Registration date	09/27/1960	Foreign priority date	NONE
Word mark	WISE		
Design mark			
Description of mark	NONE		
Goods/services	Class 046. First use: First Use: Nov 23, 1959 First Use In Commerce: Nov 23, 1959 Potato Chips		

U.S. registration no.	2325068	Application date	10/15/1996
Register	Principal		
Registration date	03/07/2000	Foreign priority date	NONE
Word mark	WISE		
Design mark			
Description of mark	NONE		
Goods/services	Class 029. First use: First Use: 1963 First Use In Commerce: 1963 snacks, namely, potato chips, onion rings, fried pork rinds, processed nuts; dry dip mix; and non-dairy based canned dips Class 030. First use: First Use: 1963 First Use In Commerce: 1963 snacks, namely, cheese-flavored corn puffs, tortilla chips, popped popcorn, corn chips, cheese snack crackers, peanut butter snack crackers, cookies and brownies		

U.S. registration no.	2325069	Application date	10/15/1996
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Register	Principal		
Registration date	03/07/2000	Foreign priority date	NONE
Word mark	WISE		
Design mark			
Description of mark	NONE		
Goods/services	<p>Class 029. First use: First Use: 1963 First Use In Commerce: 1963 snacks, namely, potato chips, onion rings, fried pork rinds, processed nuts; dry dip mix; and non-dairy based canned dips</p> <p>Class 030. First use: First Use: 1963 First Use In Commerce: 1963 snacks, namely, cheese-flavored corn puffs, tortilla chips, popped popcorn, corn chips, cheese snack crackers, peanut butter snack crackers, cookies and brownies</p>		

U.S. registration no.	3402320	Application date	02/26/2007
Register	Principal		
Registration date	03/25/2008	Foreign priority date	NONE
Word mark	WISE CHOICE		
Design mark			
Description of mark	NONE		
Goods/services	Class 029. First use: First Use: Oct 2007 First Use In Commerce: Oct 2007 potato based snack foods, namely, potato chips		

U.S. registration no.	3405949	Application date	02/26/2007
Register	Principal		
Registration date	04/01/2008	Foreign priority date	NONE
Word mark	WISE CHOICES		
Design mark			
Description of mark	NONE		
Goods/services	Class 030. First use: First Use: Oct 2007 First Use In Commerce: Oct 2007 corn based snack foods, namely, cheese flavored corn puffs, tortilla chips, popped popcorn, corn chips, cheese snack crackers and pretzels		

Attachments	WEIS QUALITY Pretzels Opposition.pdf(126235 bytes)
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Signature	/Chancellor S. Shafor/
Name	Chancellor S. Shafor
Date	06/01/2023

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

Wise Foods, Inc.)	
)	Serial No. 97/430,701
Opposer)	
)	WEIS QUALITY
v.)	
)	
WMK Holdings, Inc.)	
)	
Respondent)	Opposition No.
)	

Notice of Opposition

Opposer, Wise Foods, Inc. (“Wise” or “Opposer”), organized and existing under the laws of Delaware with a principal place of business at 228 Raseley Street, Berwick, Pennsylvania 18603 and owner of U.S. Trademark Registration No. 2,054,967 for **WISE CHOICE**, believes that it will be damaged by the issuance of a registration for the alleged mark shown in Application Serial No. 97/430,701 in Class 030 (the “Application”), filed by WMK Holdings, Inc. (“Applicant”) on May 26, 2022. Opposer hereby opposes the same pursuant to Section 13(a) of the Lanham Trademark Act of 1946 (“Lanham Act”), 15 U.S.C. § 1063(a).

As grounds for opposition, Opposer alleges as follows:

Opposer Background

1. Wise Foods, Inc. was founded in 1921 by Earl Wise, Sr., a grocer and businessman who made the decision to make potato chips out of his extra potatoes rather than let them go to waste. Since 1921, Opposer has serially manufactured, sold, and offered for sale snack foods including potato chips, corn chips, pretzels, popcorn, dips and salsa, puffed corn snacks, and others. Opposer’s snacks are highly sought after around the globe, and Opposer has sold its

snacks in many countries, including the United States.

2. Opposer is the owner of the valid and subsisting United States Trademark Registration No. 2,054,967 on the Principal Register for the mark **WISE CHOICE** (the “WISE CHOICE Mark”), issued on April 22, 1997 in International Class 029 for “potato chips” and International Class 030 for “popped popcorn, corn chips, tortilla chips, cheese flavored baked corn puffs and pretzels.”

3. The WISE CHOICE Mark does not directly describe a characteristic or quality of the products Opposer offers under its mark. Accordingly, the WISE CHOICE Mark is an inherently distinctive mark and presumed to have secondary meaning.

4. Opposer has used the WISE CHOICE Mark and WISE brand in interstate commerce in the United States continuously since January, 1960 in connection with the promotion of its snack goods. Any periods of non-use were excusable due to trade embargo or other circumstances beyond Opposer’s control.

5. Since at least 1960, Opposer has invested significant time, money, and resources in marketing, advertising, and promoting the goods offered under the WISE CHOICE Mark through print and online advertising, promotional materials, trade show attendance, trade publication advertisements, and other programs. These activities promoted a direct connection between Opposer’s goods and the WISE CHOICE Mark such that consumers would, and do, recognize the mark as a source identifier for Opposer’s snack goods.

6. Since at least 1960, Opposer has invested significant time, money, and resources in marketing, advertising, and promoting the goods offered under the WISE CHOICE Mark through the acquisition of, application for, and registration of other WISE-related marks, including United States Trademark Registration No. 705,030 on the Principal Register for the



mark , issued on September 27, 1960 for “potato chips”; United States Trademark Registration No. 2,325,068 on the Principal Register for **WISE**, issued on March 7, 2000 for “snacks, namely, potato chips, onion rings, fried pork rinds, processed nuts; dry dip mix; and non-dairy based canned dips” and “snacks, namely, cheese-flavored corn puffs, tortilla chips, popped popcorn, corn chips, cheese snack crackers, peanut butter snack crackers, cookies and brownies”; United States Trademark Registration No. 2,325,069 for the mark



, issued on March 7, 2000 for “snacks, namely, potato chips, onion rings, fried pork rinds, processed nuts; dry dip mix; and non-dairy based canned dips” and “snacks, namely, cheese-flavored corn puffs, tortilla chips, popped popcorn, corn chips, cheese snack crackers, peanut butter snack crackers, cookies and brownies”; United States Trademark Registration No. 3,402,320 for the mark **WISE CHOICE**, issued on March 25, 2008 for “potato based snack foods, namely, potato chips”; and United States Trademark Registration No. 3,405,949 (now cancelled) for the mark **WISE CHOICES**, issued on April 1, 2008 for “corn based snack foods, namely, cheese flavored corn puffs, tortilla chips, popped popcorn, corn chips, cheese snack crackers and pretzels” and expired on November 2, 2018.

7. Because of Opposer’s widespread, continuous, and exclusive use of the WISE CHOICE Mark and other WISE-related marks, consumers associate potato chips and other snacks with Opposer as their source, and Opposer has acquired substantial goodwill and secondary meaning in connection with the WISE CHOICE Mark, in addition to the already inherently distinctive nature of the mark. Thus, Opposer owns valid and subsisting federal statutory and

common law rights to the WISE CHOICE Mark, and Opposer's WISE CHOICE Mark is distinctive to both the consuming public and in Opposer's trade.

Applicant Background

8. Upon information and belief, Applicant, with an address at 103 Foulk Road, Suite 101, Wilmington, Delaware, USA filed Trademark Application Serial No. 97/430,701 on May 26, 2022, to register the proposed mark **WEIS QUALITY** in International Class 030 for "soft pretzels".

9. According to the Application, Applicant asserts a Section 1(b) "Intent to Use" basis for the Application, which unquestionably corresponds to a use-date later in time than Opposer's Registration of the WISE CHOICE Mark on April 22, 1997.

10. Opposer's WISE CHOICE Mark has priority over the Applied-for Mark because all relevant dates predate the Applicant's filing date or, upon information and belief, any other date on which the Applicant may rely for purposes of priority.

11. Applicant's Applied-for Mark is confusingly similar to Opposer's WISE CHOICE Mark because the respective marks are confusingly similar in appearance, connotation, and overall commercial impression. Indeed, the word "WEIS," as used by Applicant, has an identical pronunciation to "WISE."

12. Applicant and Opposer's goods are related because they are both related to pretzels, and so would be found within the same channels of trade, found by consumers at the same merchants and retailers, and found by consumers in the same location within those merchants and retailers. In fact, Applicant's chain of grocery stores, Weis Markets, offers a number of Opposer's goods for sale, including Wise® Potato Chips Golden Original™ (<https://www.weismarkets.com/shop/product/wise-potato-chips-golden-original/2364811>),

Wise® Cheez Doodles® (<https://www.weismarkets.com/shop/product/wise-cheez-doodles-baked-puffed/130189>), Wise® White Cheddar Flavored Popcorn (<https://www.weismarkets.com/shop/product/wise-popcorn-air-popped-white-cheddar-flavored/273130>), among others, thereby guaranteeing the inclusion of both Opposer's goods and Applicant's goods in the same channels of trade.

13. Opposer's long-standing use of the WISE CHOICE Mark and other WISE-related marks are associated with the Opposer's snack foods. Thus, the use of the confusingly similar Applied-for Mark by Applicant for products in the same channels of trade is likely to result in consumer confusion as to the source of the Opposer's snack foods, a mistaken assumption that the Opposer is affiliated with the Applicant, or that Opposer endorses the foods and snack food products of Applicant.

14. Registration of Applicant's Applied-for Mark represents a real threat to the goodwill of the WISE CHOICE Mark built by Opposer over years of continuous use, advertising expenditures, and sales.

15. That the Applied-for Mark is highly likely to cause consumer confusion with Opposer's WISE CHOICE Mark means Opposer will be damaged by registration of the Application.

Likelihood of Confusion 15 U.S.C. § 1052(d)

16. Opposer repeats and realleges each allegation set forth above.

17. The Applied-for Mark is barred from registration because it consists of or comprises a mark which so resembles Opposer's previously used and registered WISE CHOICE Mark as to be likely, when used in connection with the alleged goods of Applicant, to cause confusion, mistake, or deception within the meaning of 15 U.S.C. § 1052(d).

18. Opposer has priority based upon its valid and subsisting prior registration for WISE CHOICE. In addition, Opposer has priority based upon its prior use of the WISE CHOICE Mark in commerce in connection with its products. Various WISE-related marks have been used in commerce in connection with Opposer's products for nearly 90 years, and the WISE CHOICE Mark has been used in commerce in connection with Opposer's products for nearly 30 years and was in use in commerce nearly 30 years before the filing date of the Application.

19. Opposer has clearly used the WISE CHOICE Mark in commerce for an extended period of time before any date of first use that Applicant may establish in connection with the Applied-for Mark.

20. The Applied-for Mark is confusingly similar in appearance, connotation, and overall commercial impression to Opposer's WISE CHOICE Mark. Opposer's WISE CHOICE Mark includes the root word "WISE" and the Applied-for Mark includes the root word "WEIS." Both root words have the same pronunciation. "Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark." (*Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372 (Fed. Cir. 2005)). In fact, the Applied-for Mark differs from Opposer's WISE CHOICE Mark only in a change in spelling consisting of the same four letters, which misspelling has no effect on the pronunciation. There is no additional drawing features or text. As such, there is no indication in the Applied-for Mark as to the source of goods besides the words "WEIS QUALITY". Thus, consumers are expected to rely on their own prior experience and, as Opposer as illustrated above, the word "WISE" has a long history of signifying Opposer's brand for Opposer's snack foods.

21. Applicant's Applied-for Mark is likely to be seen by the same customers as those who purchase Opposer's goods. Applicant seeks registration for the Applied-for Mark for the

same product, pretzels, as Opposer's WISE CHOICE mark, and so would be distributed and purchased in the same channels of trade as the goods covered by Opposer's WISE CHOICE Mark. Indeed, Applicant's Weis Market grocery store already offers a variety of Opposer's Wise® products for sale.

22. Accordingly, Applicant's Applied-for Mark so resembles Opposer's prior used and registered WISE CHOICE Mark as to be likely, when used in connection with Applicant's claimed goods, to cause confusion, or to cause mistake, or to deceive under Section 2(d) of the Lanham Act, as amended, 15 U.S.C. § 1052(d).

False Suggestion of a Connection 15 U.S.C. § 1052(a)

23. Opposer repeats and realleges each allegation set forth above.

24. Applicant's Applied-for Mark would likely be recognized as being owned by Opposer, due to its confusing similar appearance and use on goods related to those covered by the WISE CHOICE Mark.

25. Opposer's WISE CHOICE Mark has achieved a level of recognition in the trade and the general public such that Applicant's use of the Applied-for Mark would cause consumers to presume there is a connection between Applicant and Opposer, when none exists.

26. Accordingly, pursuant to 15 U.S.C. §1052(a), Applicant's Applied-for Mark is not entitled to registration.

Dated: June 1, 2023

By: /Peter G. Pappas/
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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing NOTICE OF OPPOSITION was served by e-mail on June 1, 2023, upon Applicant at the following e-mail addresses of record:

ebhem@atllp.com; iptm@atllp.com; ddiamondwood@atllp.com.

/Peter G. Pappas/

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