

ESTTA Tracking number: **ESTTA276945**

Filing date: **04/08/2009**

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	04/08/2009
Address	7701 Legacy Drive Plano, TX 75024 UNITED STATES

Correspondence information	Frito-Lay North America, Inc. 7701 Legacy Drive Plano, TX 75024 UNITED STATES trademarks@fritolay.com, catherine.barry@fritolay.com
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**Applicant Information**

Application No	77517921	Publication date	12/09/2008
Opposition Filing Date	04/08/2009	Opposition Period Ends	04/08/2009
Applicant	Bell, Colleen 201 N Brearly St #4 Madison, WI 53703 UNITED STATES		

**Goods/Services Affected by Opposition**


Class 041. First Use: 2004/06/01 First Use In Commerce: 2004/06/01 All goods and services in the class are opposed, namely: Entertainment services, namely, participation in roller derby competitions; Entertainment services, namely, personal appearances by a roller derby competitor
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**Grounds for Opposition**


False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)
Dilution	Trademark Act section 43(c)

**Marks Cited by Opposer as Basis for Opposition**

U.S. Registration No.	66414	Application Date	03/17/1906
Registration Date	11/26/1907	Foreign Priority Date	NONE

Word Mark	CRACKER JACK
Design Mark	
Description of Mark	NONE
Goods/Services	Class U046 (International Class 030). First use: First Use: 1906/01/00 First Use In Commerce: 1906/01/00 CANDIED POPCORN

U.S. Registration No.	197337	Application Date	10/02/1924
Registration Date	04/14/1925	Foreign Priority Date	NONE

Word Mark	CRACKER JACK
Design Mark	
Description of Mark	NONE
Goods/Services	Class U046 (International Class 030). First use: First Use: 1919/06/00 First Use In Commerce: 1919/06/00 CONFECTION - VIZ, CANDIED POP CORN

U.S. Registration No.	1510340	Application Date	02/19/1988
Registration Date	10/25/1988	Foreign Priority Date	NONE

Word Mark	WHEN YOU'RE REALLY GOOD THEY CALL YOU CRACKER JACK
Design Mark	
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 1983/00/00 First Use In Commerce: 1983/00/00 CANDIED POPCORN

U.S. Registration No.	1542439	Application Date	05/19/1988
Registration Date	06/06/1989	Foreign Priority Date	NONE

Word Mark	CRACKER JACK
Design Mark	

Description of Mark	NONE
Goods/Services	Class 014. First use: First Use: 1988/03/28 First Use In Commerce: 1988/03/28 WATCHES

U.S. Registration No.	2165845	Application Date	06/04/1997
Registration Date	06/16/1998	Foreign Priority Date	NONE

Word Mark	CRACKER JACK
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Design Mark	
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Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 1997/05/01 First Use In Commerce: 1997/05/01 popcorn based snack products

U.S. Registration No.	2224438	Application Date	05/06/1998
Registration Date	02/16/1999	Foreign Priority Date	NONE

Word Mark	CRACKER JACK
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 030. First use: First Use: 1906/01/00 First Use In Commerce: 1906/01/00 Popcorn-based snack food
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U.S. Registration No.	2888267	Application Date	08/23/2002
Registration Date	09/28/2004	Foreign Priority Date	NONE

Word Mark	CRACKER JACK
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Design Mark	<p style="text-align: center;"><b>CRACKER JACK</b></p>
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Description of Mark	NONE
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Goods/Services	Class 028. First use: First Use: 1906/01/00 First Use In Commerce: 1906/01/00
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	BRAIN TEASERS, NAMELY, MANIPULATIVE PUZZLES AND OPTICALLY MANIPULATIVE PUZZLES; PUZZLES		
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U.S. Registration No.	2921684	Application Date	06/16/2003
Registration Date	01/25/2005	Foreign Priority Date	NONE
Word Mark	CRACKER JACK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2003/12/00 First Use In Commerce: 2003/12/00 RICE CAKES		

U.S. Registration No.	3174481	Application Date	06/20/2003
Registration Date	11/21/2006	Foreign Priority Date	NONE
Word Mark	CRACKER JACK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2003/12/01 First Use In Commerce: 2003/12/01 RICE CAKES		

U.S. Registration No.	3268731	Application Date	07/18/2003
Registration Date	07/24/2007	Foreign Priority Date	NONE
Word Mark	CRACKER JACK		
Design Mark			

Description of Mark	NONE
Goods/Services	Class 016. First use: First Use: 1998/01/01 First Use In Commerce: 1998/01/01 TEMPORARY TATTOOS; STICKERS; STATIONERY

U.S. Registration No.	3268971	Application Date	07/16/2003
Registration Date	07/24/2007	Foreign Priority Date	NONE
Word Mark	CRACKER JACK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 016. First use: First Use: 1998/01/01 First Use In Commerce: 1998/01/01 TEMPORARY TATTOOS; STATIONERY; STICKERS		

Attachments	71017984#TMSN.gif ( 1 page )( bytes ) 71203358#TMSN.gif ( 1 page )( bytes ) 75303143#TMSN.gif ( 1 page )( bytes ) 76443177#TMSN.gif ( 1 page )( bytes ) 76526598#TMSN.jpeg ( 1 page )( bytes ) 76533575#TMSN.gif ( 1 page )( bytes ) Notice of Opposition CRACKERJACK.pdf ( 7 pages )(228119 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	/Jeanette S. Zimmer/
Name	Jeanette S. Zimmer
Date	04/08/2009

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

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FRITO-LAY NORTH AMERICA, INC. : In the Matter of Application  
: Serial No. 77/517921  
Opposer, : CRACKERJACK  
: :  
v. : Published in the Official Gazette  
: on December 9, 2008  
COLLEEN BELL, Individual :  
: :  
Applicant. : Opposition No. \_\_\_\_\_  
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**NOTICE OF OPPOSITION**

Frito-Lay North America, Inc., a Delaware corporation, having a place of business at 7701 Legacy Drive, Plano, TX 75024, hereby opposes the application of Colleen Bell (hereinafter "Bell"), a United States citizen, pursuant to 37 CFR § 2.104(a), for the mark CRACKERJACK, Application Serial No. 77/517921, in Class 41.

As grounds for opposition, Opposer states:

1. Frito-Lay North America, Inc., through its predecessors in interest and title, and through its related companies, divisions and/or licensees (hereinafter individually and/or collectively referred to as "Opposer"), has been engaged in the manufacture and sale of snack foods for over fifty years and is now one of the largest manufacturers of snack foods in the United States.

2. Opposer's snack foods are marketed and sold in tremendous quantities on a nationwide basis, supported by many millions of dollars of advertising and promotion each year. Opposer's food products are sold in almost every supermarket in the United States as well as in numerous convenience stores, vending machines, mass merchandise stores, schools and other outlets.

3. Opposer has used the mark CRACKER JACK and variants thereof on and in connection with snack foods and related products, including, but not limited, to candied popcorn since at least as early as January 1906. Since a date long prior to the filing date of the application for the above identified registration and continuing through the present, the mark CRACKER JACK has been identified with Opposer and has appeared on a tremendous amount of advertising and marketing materials.

4. Opposer has, by virtue of incredibly extensive usage, advertising and promotion built up a very high level of consumer and trade recognition symbolized by its mark CRACKER JACK and variants for snack foods, including, candied popcorn. Due to extensive public exposure to, and awareness by, consumers and the trade, the mark CRACKER JACK is famous and has acquired and now possesses an extremely favorable reputation and distinctiveness with an invaluable amount of goodwill, solely signifying Opposer as the source of food products of high quality.

5. Opposer's CRACKER JACK mark, referred to in the well-known song "Take Me Out to the Ballgame" suggests a strong association of Opposer's products with sporting competitions, specifically baseball.


6. Each year for at least the past ten (10) years, Opposer has sold tens of millions of dollars worth of products in connection with the mark CRACKER JACK and variants. By virtue of its tremendous sales success, and extensive and popular advertising and promotional efforts, Opposer's CRACKER JACK trademark has long enjoyed strong brand recognition and distinctiveness which has resulted in a highly favorable reputation and goodwill among the trade and consumers as identifying high quality snack food products manufactured and exclusively sold by Opposer.




6. Since first using CRACKER JACK in connection with snack foods, Opposer has expanded its use of the mark to identify other snack food styles, flavors and products, manufactured and sold exclusively by Opposer.

Opposer sells CRACKER JACK rice cakes and has previously sold ice cream and ice cream bars and peanut brittle. Opposer also sells or has sold items non-food items with the CRACKER JACK brand, such as shirts, puzzles and watches.

7. Opposer has also adopted, used and registered variants of CRACKER JACK as a mark to identify other products manufactured and sold exclusively by Opposer. By virtue of extensive sales and use, such variants also acquired a favorable reputation among consumers and the trade which further reinforces the distinctiveness and favorable reputation enjoyed by Opposer, its mark CRACKER JACK and variants thereof, as well as goods identified thereby.

8. Opposer is the owner of valid and subsisting U.S. trademark registrations for the mark CRACKER JACK and variants, including, but not limited to the following:

MARK	U.S. REG.	REG. DATE	GOODS (FIRST USE)
<b>Cracker Jack</b>	66,414	11/26/1907	Candied popcorn (First Use January 1906)
	197,337	04/14/1925	Confection - viz, candied pop corn. (First Use June 1919)
WHEN YOU'RE REALLY GOOD THEY CALL YOU CRACKER JACK	1,510,340	10/25/1988	Candied popcorn (First Use 1983)
CRACKER JACK	1,542,439	06/06/1989	Watches (First Use March 1988)

	2,165,845	06/16/1988	Popcorn-based snack products (First Use May 1997)
CRACKER JACK	2,224,438	02/16/1999	Popcorn-based snack food (First Use January 1906)
CRACKER JACK	2,888,267	09/28/2004	Brain teasers, namely manipulative puzzles and optically manipulative puzzles; puzzles (First Use January 1906)
CRACKER JACK	2,921,684	01/25/2005	Rice cakes (First Use December 2003)
	3,174,481	11/21/2006	Rice cakes (First Use December 2003)
	3,268,731	07/24/2007	Temporary tattoos; stationery; stickers (First Use January 1998)
CRACKER JACK	3,268,971	07/23/2007	Temporary tattoos; stationery; stickers (First Use January 1998)

The above registrations are valid, subsisting, and in full force and effect, and Registration Nos. 66,414; 197,337; 1,410,340; 1,542,439; 2,165,845 and 2,224,438; are incontestable under Section 15 of the Lanham Act. Hereinafter the above CRACKER JACK marks and variants thereof, including those registered and/or used in commerce by Opposer, are referred to individually and/or collectively as the "CRACKER JACK Marks" which are inherently distinctive.

9. As a result of the extensive and continuous advertising, sale, use and promotion of products in connection with Opposer's CRACKER JACK Marks and their high quality, said marks have acquired substantial public and consumer recognition throughout the United States, enjoy valuable goodwill, have become famous or well known, and have become assets of considerable value to Opposer.

10. Bell filed Trademark Application Serial No. 77/517921 for the mark CRACKERJACK for "entertainment services, namely, participation in roller derby competitions; entertainment services, namely personal appearances by a roller derby competitor" in International Class 41.

11. Opposer has priority over Applicant because its use, application filing dates and/or registration dates for the CRACKER JACK Marks long precede Applicant's filing date for its application and/or any claimed use (first use date claimed June 1, 2004) by Applicant of the purported mark CRACKERJACK.

12. Registration of the CRACKERJACK mark is barred by the provisions of Section 2(d) of the Lanham Act because the said mark consists of or comprises a mark which so resembles a mark previously registered in the United States Patent and Trademark Office and/or used in the United States by Opposer and not abandoned, as to be likely, when used in connection with the alleged goods of the Applicant, to cause confusion, mistake or deception.

13. Applicant's alleged mark CRACKERJACK is confusingly similar to Opposer's aforementioned previously used and registered CRACKER JACK Marks.

14. Applicant's alleged mark CRACKERJACK so resembles Opposer's previously used and/or registered and famous CRACK JACK Marks, as to be likely to cause confusion, to cause mistake or to deceive. The likelihood of confusion, mistake or deception that would also arise from concurrent use and registration of Applicant's mark CRACKERJACK with Opposer's use and registration of its CRACKER JACK Marks is that persons are likely to believe that Applicant and its

services are in some way legitimately connected or affiliated with, sponsored, approved, endorsed or licensed by Opposer when, in fact, they are not. Accordingly, registration of Applicant's mark CRACKERJACK is barred by the provisions of Section 2(d) and Section 43(a) of the Lanham Act.

15. Further, Opposer's distinctive CRACKER JACK Marks became famous long prior to the filing date of Application Serial No. 77/517921, as well as the claimed dates of first use, and the registration and use of Applicant's mark CRACKERJACK is likely to dilute the distinctive quality of Opposer's CRACKER JACK Marks. Accordingly, Applicant's alleged mark CRACKERJACK is not entitled to registration under Section 43(c) of the Lanham Act.

16. As applied to Applicant's services, the word CRACKERJACK is descriptive and, therefore, should be barred from registration by Section 2(e)(1) and Section 43 (a)(1)(B) of the Lanham Act. The word CRACKERJACK is defined as "a person or thing that shows marked ability or excellence<sup>1</sup>." Applicant's use the name CRACKERJACK in connection with the provision of her services as a roller derby competitor, immediately describes, or misdescribes, Applicant and Applicant's abilities in competing in roller derby sport competitions.

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<sup>1</sup> crackerjack. Dictionary.com. Dictionary.com Unabridged (v 1.1). Random House, Inc. <http://dictionary.reference.com/browse/crackerjack> (accessed: April 08, 2009).

WHEREFORE, Opposer prays that Application Serial No. 77/517921 be rejected, and that registration of the mark CRACKERJACK be denied and refused.

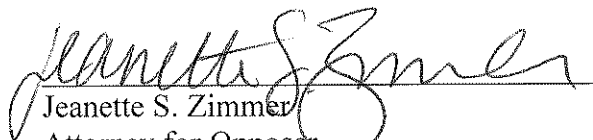
This Notice of Opposition is being filed electronically pursuant to the ESTTA system.

Respectfully submitted,

FRITO-LAY NORTH AMERICA, INC.

Date: April 8, 2009

By:

  
Jeanette S. Zimmer

Attorney for Opposer

7701 Legacy Drive, Mail Stop 3A-421

Plano, TX 75024

Tel: (972) 334-2587

Fax: (972) 334-3871

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing NOTICE OF OPPOSITION was served on counsel for Applicant, this 8<sup>th</sup> day of April, 2009, by sending same via First Class mail, postage prepaid, to the following:

Quinn Heraty  
Heraty Law PLLC  
P.O. Box 653  
New York, NY 10276-0653

  
Jeanette S. Zimmer