

ESTTA Tracking number: **ESTTA267357**

Filing date: **02/18/2009**

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

Proceeding	91187963
Party	Defendant Flores, Karlo
Correspondence Address	STEPHEN L. BAKER BAKER AND RANNELLS, PA 575 ROUTE 28 STE 102 RARITAN, NJ 08869-1354 UNITED STATES officeactions@br-tmlaw.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Ryan A. McGonigle
Filer's e-mail	r.mcgonigle@br-tmlaw.com, officeactions@br-tmlaw.com, k.hnasko@br-tmlaw.com
Signature	/Ryan A. McGonigle/
Date	02/18/2009
Attachments	20070713003010427.pdf ( 25 pages )(718415 bytes )

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

X

Chocoladefabriken Lindt & Sprungli AG  
Opposer,

Opposition No. 91187963  
Trademark: 73% INTENSE DARK  
Serial No.: 77258474

vs.

Karlo Flores dba KFM Foods International  
Applicant.

X

**FILED VIA ESTTA**

**APPLICANT'S MOTION TO DISMISS FOR LACK OF SERVICE  
AND BRIEF IN SUPPORT THEREOF**

Applicant, Karlo Flores d/b/a KFM Foods International ("Applicant" or "KFM"), a citizen of Canada, by and through his undersigned counsel, respectfully moves the Board pursuant to 37 C.F.R. §2.119 and Fed. R. Civ. P. 12(b)(5), to dismiss the Notice of Opposition filed by Opposer Chocoladefabriken Lindt & Sprungli AG, a corporation organized under the laws of Switzerland, with its principal place of business at Seestraße 204 Kilchberg, Switzerland CH-8802 ("Opposer" or "Lindt") for lack of service. The salient facts supporting this Motion are set forth in the accompanying declaration of Stephen L. Baker, Esq. (annexed hereto as Exhibit "A").

The grounds for this Motion are:

1. The record for KFM's application reveals that the 73% INTENSE DARK mark (hereinafter, "the Mark") was published for opposition purposes on August 12, 2008, and the opposition period as last extended expired on December 10, 2008. Thus, the time for filing an opposition or further request for extension of time appears to have

expired on December 10, 2008. *See* Section 13 of the Lanham Act and Trademark Rule 2.102(c).

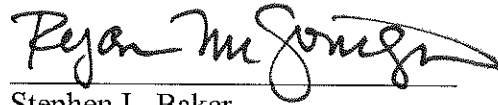
2. Under the Board's current rules, "the notice [of opposition] must include proof of service on the applicant, or its attorney or domestic representative of record, **at the correspondence address of record in the Office.**" 37 C.F.R. §§2.101(b) and 2.119 (emphasis added).
3. The Notice of Opposition filed on the last day of the opposition period, December 10, 2008, contains a proof of service that shows Opposer only served the Applicant and not its counsel, who is "the correspondence address of record in the Office." A copy of Opposer's Notice of Opposition with accompanying Certificate of Service is annexed hereto as Exhibit "B." Thus, Opposer has failed to comply with the service of process requirement. Since the opposition period expired on December 10, 2008 (as extended to a maximum of 90 days), Opposer cannot remedy its oversight. Accordingly, this opposition should be dismissed as a nullity.
4. On January 26, 2009, over a month after the opposition period closed, Opposer's counsel sent Applicant's counsel a copy of the Notice of Opposition with the transmittal letter it sent to Applicant's place of business in British Columbia, Canada (hereinafter, "the January 26<sup>th</sup> Letter"). A copy of this correspondence is annexed hereto as Exhibit "C." The January 26<sup>th</sup> Letter stands further as an admission that Opposer has failed to comply with the service of process requirement as it shows that no attempt to serve the Notice of Opposition "at the correspondence address of record in the Office" was made within the opposition period.

5. Moreover, the attached declaration of Stephen L. Baker, Esq., the attorney of record, shows that Mr. Baker did not receive a copy of the Notice within the opposition period. *See* Exhibit “A” at ¶¶2, 3.
6. This case is similar to *Schott AG v. L’Wren Scott*, 88 USPQ 2d 1862 (TTAB 2008). In *Schott AG*, the Opposer failed to include a proof of service stating that the Notices of Opposition were sent to the correspondence address of record in the Office. There, the Opposer filed its Notices of Opposition by mail and not via the Board’s ESTTA online filing system. On this subject, the Board in *Schott AG* stated “[w]e point out that if a plaintiff files its complaint through the Board’s ESTTA online filing system, it cannot complete the process unless it confirms that it has forwarded a service copy of its complaint to all parties **at their addresses of record.**” *Id.* at 1863, fn.3 (emphasis added).
7. Applicant’s address of record in the Office is Stephen L. Baker, Baker and Rannells, PA, 575 Route 28, Suite 102, Raritan, New Jersey 08869. *See* Exhibit “D” annexing a copy of the USPTO’s TARR Report for the Mark showing Mr. Baker as the Mark’s “correspondent.”
8. Here, Opposer filed the instant Notice of Opposition via the Board’s ESTTA system but did not serve the proper recipient for its complaint. It did eventually serve the Notice of Opposition on Mr. Baker in late January 2009, over six weeks after the opposition period had closed. *See* Exhibit “C.”
9. Because Opposer’s Notice of Opposition was not served upon Applicant at its address of record in the Office, the Board should dismiss the instant opposition as a nullity and forward KFM Foods’ application for issuance of allowance.

**WHEREFORE**, Applicant respectfully requests that this opposition be dismissed and application Serial No. 77/258474 for 73% INTENSE DARK be forwarded for issuance of allowance.

Dated: February 18, 2009

BAKER and RANNELLS, PA

A handwritten signature in black ink, appearing to read "Ryan A. McGonigle", written over a horizontal line.

Stephen L. Baker  
Ryan A. McGonigle  
Attorneys for Petitioner  
575 Route 28, Suite 102  
Raritan, New Jersey 08869  
Tel: 908-722-5640  
Fax: 908-725 7088  
E-Mail: [s.baker@br-tmlaw.com](mailto:s.baker@br-tmlaw.com); and  
[r.mcgonigle@br-tmlaw.com](mailto:r.mcgonigle@br-tmlaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing APPLICANT'S MOTION TO DISMISS FOR LACK OF SERVICE AND BRIEF IN SUPPORT THEREOF in *Chocoladefabriken Lindt & Sprungli AG v. Karlo Flores d/b/a KFM Foods International*, Opposition No. 91187963 was served on counsel for Opposer, this 18 day of February, 2009, by sending same via First Class Mail, postage prepaid, to:

Jason K. Schmitz  
Christopher Mackey  
Mayer Brown LLP  
P.O. Box 2828  
Chicago, IL 60690-2828

  
\_\_\_\_\_  
Ryan A. McGonigle

## **Exhibit “A”**

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

X

Chocoladefabriken Lindt & Sprungli AG  
Opposer,

Opposition No. 91187963  
Trademark: 73% INTENSE DARK  
Serial No.: 77258474

vs.

Karlo Flores dba KFM Foods International  
Applicant.

X

**DECLARATION OF STEPHEN L. BAKER, ESQ.**

1. I am a partner at Baker and Rannells, PA and the attorney of record in the matter of Trademark Application Serial No. 77/258474. I submit this declaration in support of Applicant, Karlo Flores d/b/a KFM Foods International's ("Applicant") Motion to Dismiss this opposition on the grounds that Opposer, Chocoladefabriken Lindt & Sprungli AG ("Opposer") failed to comply with the service requirement.
2. I received the Board's December 10, 2008 order instituting Opposition No. 91187963. However, I was not sent and did not receive—at any time during the pendency of the opposition period—a copy of the Notice of Opposition or any correspondence relating thereto from Opposer or its counsel.
3. I am designated as being the attorney of record for the aforementioned application. In addition, the Baker and Rannells law firm is listed as being the correspondence address for the owner of the application. As such, Opposer was required under Trademark Rule 2.101(b) to serve the Notice of Opposition on me.
4. I did not receive a copy of the Notice of Opposition from Opposer's counsel until sometime in late January of this year. A letter from Opposer's counsel addressed to me




indicates that it was sent on January 26, 2009—well after the opposition period had ended.

5. Other than the late service, I am personally aware of no attempts by Opposer or its counsel to effect service of process on me or our firm, Baker and Rannells, PA.

I certify under penalty of perjury under 28 U.S.C. §1746 that the foregoing is true and correct.

Dated: February 18, 2009



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Stephen L. Baker

## **Exhibit “B”**

ESTTA Tracking number: **ESTTA254241**

Filing date: **12/10/2008**

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	Chocoladefabriken Lindt & Sprungli AG
Granted to Date of previous extension	12/10/2008
Address	Seestraße 204 Kilchberg, CH-8802 SWITZERLAND

Attorney information	Jason K. Schmitz Mayer Brown LLP P.O. Box 2828 Chicago, IL 60690-2828 UNITED STATES ipdocket@mayerbrown.com, jason.schmitz@mayerbrown.com, cmackey@mayerbrown.com Phone:312-701-8864
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#### Applicant Information

Application No	77258474	Publication date	08/12/2008
Opposition Filing Date	12/10/2008	Opposition Period Ends	12/10/2008
Applicant	Flores, Karlo 2385 Burrard Street Vancouver, V6J3J2 CANADA		

#### Goods/Services Affected by Opposition

Class 030. First Use: 2007/03/01 First Use In Commerce: 2007/03/01 All goods and services in the class are opposed, namely: Chocolate; Chocolate bars
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#### 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. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	INTENSE DARK		
Goods/Services	chocolate		

Attachments	73% Intense Dark Notice of Opposition.pdf ( 3 pages )(76125 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	/Jason K. Schmitz/
Name	Jason K. Schmitz
Date	12/10/2008

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

In the matter of Trademark Application Serial No. 77258474  
Filed: August 17, 2007  
For the mark: 73% INTENSE DARK  
Published in the Official Gazette on: August 12, 2008

Chocoladefabriken Lindt & Sprungli AG	)	
	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. _____
	)	
Karlo Flores dba KFM Foods International	)	
	)	
Applicant.	)	

**NOTICE OF OPPOSITION**

Opposer Chocoladefabriken Lindt & Sprungli AG (“Opposer”) believes that it will be damaged by registration of the mark 73% INTENSE DARK, Serial No. 77/258474, for use with “chocolate; chocolate bars” in International Class 30 (“U.S. Application”), and hereby opposes the same pursuant to Section 13(a) of the Trademark Act of 1946, as amended (the “Lanham Act”), 15 U.S.C. § 1063(a).

The grounds for opposition are as follows:

1. Opposer is a corporation organized under the laws of Switzerland, with its principal place of business located at Seestraße 204 Kilchberg, Switzerland CH-8802.
2. Upon information and belief, applicant Karlo Flores d/b/a KFM Foods International (“Applicant”) is a Canadian individual with a principal place of business located at 2385 Burrard Street, Vancouver, Canada V6J3J2.

3. Opposer and its related companies are among the world's leading producers and sellers of candy and chocolate products.

4. Opposer and its related and predecessor companies have been offering candy and chocolate products in commerce under the trademark INTENSE DARK™ since at least as early as 2005.

5. The U.S. Application is confusingly similar in sound and appearance to Opposer's INTENSE DARK™ trademark.

6. In addition to the confusingly similar sound and appearance of the marks, the U.S. Application is used in connection with various candy and chocolate products in Class 30 which are identical to the type of chocolate products offered under Opposer's INTENSE DARK™ mark.

7. Opposer claims a first use date of at least 2005 in connection with its INTENSE DARK™ trademark.

8. Applicant has claimed a first use date of March 1, 2007 for the U.S. Application.

9. Given the visual similarity of Opposer's INTENSE DARK™ mark and the U.S. Application and the similar nature of the goods offered in connection with the marks, the U.S. Application, should it be permitted to register, will cause confusion in the marketplace and mislead consumers into believing Applicant's goods are offered by Opposer or that there is an association or affiliation between the Applicant and Opposer. Such confusion violates Opposer's rights under the Lanham Act as the owner of senior trademark rights which precede the claimed first use date of the U.S. Application.

WHEREFORE, Opposer believes and alleges that it will be damaged by the registration of the U.S. Application, that its use is likely to cause consumer confusion as set forth above, and Opposer requests that:

1. Judgment in the present opposition be entered in favor of Opposer and against Applicant, with prejudice;
2. The present opposition be sustained; and
3. Registration of the U.S. Application be rejected and refused.

Respectfully submitted,

Chocoladefabriken Lindt & Sprungli AG

By:  \_\_\_\_\_

Jason K. Schmitz  
Mayer Brown LLP  
P.O. Box 2828  
Chicago, Illinois 60690-2828  
(312) 701-8864  
(312) 706-8517 – Facsimile  
jason.schmitz@mayerbrown.com

Attorney for Opposer  
Chocoladefabriken Lindt & Sprungli AG

## **Exhibit “C”**



# MAYER • BROWN

Mayer Brown LLP  
71 South Wacker Drive  
Chicago, Illinois 60606-4637

Main Tel (312) 782-0600  
Main Fax (312) 701-7711  
www.mayerbrown.com

**Jason K. Schmitz**  
Direct Tel (312) 701-8864  
Direct Fax (312) 706-8517  
jason.schmitz@mayerbrown.com

January 26, 2009

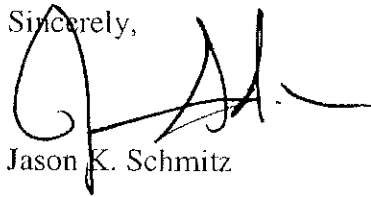
Mr. Stephen L. Baker  
Baker and Rannells, PA  
575 Route 28, Ste. 102  
Raritan, NJ 08869-1354

Re: Notice of Opposition against US trademark  
application for 73% INTENSE DARK (Ser. No.  
77/258474)

Dear Mr. Baker:

Please see the enclosed cover letter and Notice of Opposition as served on your client, Mr. Karlo Flores, on December 10, 2008.

Sincerely,



Jason K. Schmitz

Encl.

MAYER • BROWN

Mayer Brown LLP  
71 South Wacker Drive  
Chicago, Illinois 60606-4637

Main Tel (312) 782-0600  
Main Fax (312) 701-7711  
www.mayerbrown.com

**Jason K. Schmitz**  
Direct Tel (312) 701-8864  
Direct Fax (312) 706-8517  
jason.schmitz@mayerbrown.com

December 10, 2008

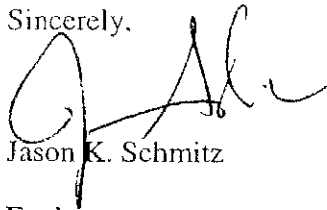
Mr. Karlo Flores  
d/b/a KFM Foods International  
2385 Burrard Street  
Vancouver, Canada V6J3J2

Re: Notice of Opposition against US trademark  
application for 73% INTENSE DARK (Ser. No.  
77/258474)

Dear Mr. Flores:

Please see the enclosed Notice of Opposition which was filed today.

Sincerely,



Jason K. Schmitz

Encl.

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

In the matter of Trademark Application Serial No. 77258474  
Filed: August 17, 2007  
For the mark: 73% INTENSE DARK  
Published in the Official Gazette on: August 12, 2008

Chocoladefabriken Lindt & Sprungli AG	)	
	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. _____
	)	
Karlo Flores dba KFM Foods International	)	
	)	
Applicant.	)	

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4. Opposer and its related and predecessor companies have been offering candy and chocolate products in commerce under the trademark INTENSE DARK™ since at least as early as 2005.

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8. Applicant has claimed a first use date of March 1, 2007 for the U.S. Application.

9. Given the visual similarity of Opposer's INTENSE DARK™ mark and the U.S. Application and the similar nature of the goods offered in connection with the marks, the U.S. Application, should it be permitted to register, will cause confusion in the marketplace and mislead consumers into believing Applicant's goods are offered by Opposer or that there is an association or affiliation between the Applicant and Opposer. Such confusion violates Opposer's rights under the Lanham Act as the owner of senior trademark rights which precede the claimed first use date of the U.S. Application.

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1. Judgment in the present opposition be entered in favor of Opposer and against Applicant, with prejudice;
2. The present opposition be sustained; and
3. Registration of the U.S. Application be rejected and refused.

Respectfully submitted,

Chocoladefabriken Lindt & Sprungli AG

By: 

Jason K. Schmitz  
Mayer Brown LLP  
P.O. Box 2828  
Chicago, Illinois 60690-2828  
(312) 701-8864  
(312) 706-8517 -- Facsimile  
jason.schmitz@mayerbrown.com

Attorney for Opposer  
Chocoladefabriken Lindt & Sprungli AG

**CERTIFICATE OF SERVICE**

I certify that on this date a copy of the foregoing **NOTICE OF OPPOSITION** was served by First Class mail at the following address:

Mr. Karlo Flores  
d/b/a KFM Foods International  
2385 Burrard Street  
Vancouver, Canada V6J3J2



---

Jason K. Schmitz  
Mayer Brown LLP  
P.O. Box 2828  
Chicago, Illinois 60690-2828  
(312) 701-8864  
(312) 706-8517 – Facsimile  
jason.schmitz@mayerbrown.com

Attorney for Opposer  
Chocoladefabriken Lindt & Sprungli AG

Dated: December 10, 2008

## **Exhibit “D”**

**Thank you for your request. Here are the latest results from the TARR web server.**

**This page was generated by the TARR system on 2009-02-18 12:15:30 ET**

**Serial Number:** 77258474 [Assignment Information](#)      [Trademark Document Retrieval](#)

**Registration Number:** (NOT AVAILABLE)

**Mark**

**73% INTENSE DARK**

**(words only):** 73% INTENSE DARK

**Standard Character claim:** Yes

**Current Status:** An opposition is now pending at the Trademark Trial and Appeal Board.

**Date of Status:** 2008-12-10

**Filing Date:** 2007-08-17

**Filed as TEAS Plus Application:** Yes

**Currently TEAS Plus Application:** Yes

**Transformed into a National Application:** No

**Registration Date:** (DATE NOT AVAILABLE)

**Register:** Principal

**Law Office Assigned:** LAW OFFICE 115

**Attorney Assigned:**  
DEFORD JEFFREY S

**Current Location:** 450 -Petitions Office

**Date In Location:** 2008-08-12

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**LAST APPLICANT(S)/OWNER(S) OF RECORD**

---

1. Flores, Karlo



**DBA/AKA/TA/Formerly:** DBA KFM Foods International

**Address:**

Flores, Karlo  
2385 Burrard Street  
Vancouver V6J3J2  
Canada

**Legal Entity Type:** Individual

**Country of Citizenship:** Canada

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**GOODS AND/OR SERVICES**

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**International Class:** 030

**Class Status:** Active

Chocolate; Chocolate bars

**Basis:** 1(a)

**First Use Date:** 2007-03-01

**First Use in Commerce Date:** 2007-03-01

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**ADDITIONAL INFORMATION**

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**Disclaimer:** "73%"

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**MADRID PROTOCOL INFORMATION**

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(NOT AVAILABLE)

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**PROSECUTION HISTORY**

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**NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.**

2008-12-10 - Opposition instituted for Proceeding

2008-09-09 - Extension Of Time To Oppose Received

2008-08-12 - Withdrawn From Issue - Petitions Office Request

2008-08-12 - Published for opposition

2008-07-23 - Notice of publication

2008-07-07 - Law Office Publication Review Completed

2008-07-07 - Assigned To LIE

2008-07-07 - Approved for Pub - Principal Register (Initial exam)

2008-05-28 - Teas/Email Correspondence Entered  
2008-05-27 - Communication received from applicant  
2008-05-27 - TEAS Response to Office Action Received  
2007-11-26 - Notification Of Non-Final Action E-Mailed  
2007-11-26 - Non-final action e-mailed  
2007-11-26 - Non-Final Action Written  
2007-11-26 - Assigned To Examiner  
2007-08-22 - New Application Entered In Tram

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**ATTORNEY/CORRESPONDENT INFORMATION**

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**Attorney of Record**

Stephen L. Baker

**Correspondent**

STEPHEN L. BAKER  
BAKER AND RANNELLS, PA  
575 ROUTE 28 STE 102  
RARITAN, NJ 08869-1354  
Phone Number: 908-722-5640  
Fax Number: 908-725-7088

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