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Filing date: **06/07/2010**

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	Dr. In The Kitchen, LLC		
Entity	Corporation	Citizenship	MN
Address	6872 Washington Avenue Eden Prairie, MN 55344 UNITED STATES		

Attorney information	Timothy Clise Clise, Billion & Cyr, P.A. 605 Hwy 169 N Suite 300 Plymouth, MN 55441 UNITED STATES tclise@cliseip.com Phone:763-587-7078

Applicant Information

Application No	77320480	Publication date	05/11/2010
Opposition Filing Date	06/07/2010	Opposition Period Ends	06/10/2010
International Registration No.	NONE	International Registration Date	NONE
Applicant	Ocean Deli Ltd. #110, 10091 156th Street Surrey, British Columbia, V3R0C1 CANADA		

Goods/Services Affected by Opposition

Class 030. All goods and services in the class are opposed, namely: cereal-based snack food consisting of ground flax, course rye meal and whole flax seeds

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)

Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	3534927	Application Date	07/20/2007
Registration Date	11/18/2008	Foreign Priority Date	NONE
Word Mark	FLACKERS		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 2008/06/13 First Use In Commerce: 2008/06/13 Crackers

Attachments	77235171#TMSN.jpeg (1 page)(bytes) opposition.pdf (13 pages)(1273525 bytes)

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	/TimClise/
Name	Timothy Clise
Date	06/07/2010

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of U.S. Trademark Application No. 77/320,480

For the mark: FLACKERS

Published for Opposition on 11 May 2010

Dr. In The Kitchen, LLC.

OPPOSER,

v.

Ocean Deli Ltd.

APPLICANT.

OPPOSITION NO. _____

NOTICE OF OPPOSIITION

The Opposer, Dr. In The Kitchen, LLC ("Opposer") is a limited liability company duly organized and existing under the laws of the state of Minnesota, and having a mailing address of P.O. Box 24868, Minneapolis, MN. 55424 and conducting business at 6872 Washington Avenue, Eden Prairie, MN 55344.

Opposer believes that it will be damaged by the registration of trademark application no. 77/320,480 for the mark FLACKERS as it relates to goods in International Class 030 for "cereal-based snack food consisting of ground flax, course rye meal and whole flax seeds", and hereby opposes the same.

The grounds for opposition are as follows:

1. In view of the similarity of Applicant's and Opposer's mark and the related nature of the goods of the respective parties, Applicant's Mark so resembles the Opposer's mark, identified below, as to be likely to cause confusion.

Opposer's Mark

2. Opposer is the original user of the mark FLACKERS in the United States. Opposer has used the mark FLACKERS to promote its foodstuffs including baked goods such as crackers containing flax seed as early as 22 March 2005.

3. Opposer is the owner of U.S. trademark registration 3,534,927 for the FLACKERS registered on the Principal Register for crackers on 18 November 2008 in international class 030. This application alleges a first use date of 13 June 2008 and has a filing date of 20 July 2007. A Copy of the U.S. Patent and Trademark Office's Trademark Registration Certificate is attached as Exhibit A.

4. Opposer possesses rights in the mark FLACKERS for foodstuffs on a common law basis since at least 22 March 2005. Opposer's uses of the mark in 2005 and in 2010 are attached in Exhibit B.

5. Opposer's rights in common law trademark extend from the state of Minnesota to at least the states of Arizona, California, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, and Wisconsin. Opposer's goods associated with the FLACKERS mark are also sold in online stores over global computer networks. An Affidavit by Donn Kelly, a member of the Opposer, is attached as Exhibit C.

6. Opposer's use of the mark FLACKERS mark predates the Applicant's priority date under §44(d) of 24 May 2007. Opposer's use of the FLACKERS mark predates Applicant's U.S. trademark application filing date of 2 November 2007.

7. Opposer has continuously used the FLACKERS mark since the March 2005 to present. An affidavit of Dr.Alison Levitt, a member of Dr. In The Kitchen, LLC., is attached as Exhibit D and recounts some of the use of the FLACKERS mark. The FLACKERS mark of Opposer is symbolic of the extensive goodwill and consumer recognition built up by Opposer through substantial amounts of time and effort in advertising, promoting and selling its goods under the FLACKERS mark.

COUNT ONE

Likelihood of Confusion

8. Opposer repeats and realleges each and every allegation set forth in paragraphs 1 through 6.

9. Opposer uses the FLACKERS mark in commerce. Opposer is the owner of a Federal registration for the FLACKERS mark in international class 030. Applicant has applied to register the same FLACKERS mark in international class 030. The marks are identical and are in the same international class.

10. Opposer uses the FLACKERS mark on foodstuffs, including crackers that include flax seed.

11. Applicant proposes, in its intent-to-use application, that the goods will be cereal-based snack food consisting of ground flax, course rye meal and whole flax seeds, which are very closely related to the goods covered by Opposer's Mark as the goods of both parties are grain-based foods.

12. In view of the similarity of the respective marks and the related nature of the goods of the respective parties, it is alleged that Applicant's mark so resemble Opposer's Mark, as to be likely to cause confusion, or to cause mistake, or to deceive.

13. Opposer will be damaged by the Applicant's mark if Applicant's mark proceeds to registration in view of the established prior rights of Opposer in the FLACKERS mark. In addition, Opposer will be damaged because Applicant's applied for mark is confusingly similar to Opposer's FLACKERS mark, and consumers are likely to be confused between goods to be sold in connection with Applicant's mark and those sold in connection with Opposer's mark.

14. The registration of the FLACKERS mark to Applicant would be contrary to Section 2 of the Lanham Act, 15 U.S.C. 1052 (particularly to 15 U.S.C. 1052(d)), and violate or diminish the prior and superior rights of Opposer in Opposer's FLACKERS mark.

WHEREFORE, Opposer respectfully requests that Application No. No. 77/320,480 be refused and that this Opposition be sustained in favor of Opposer.

Opposer has paid the Opposition fee of $300 electronically. If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 50-3141.

Respectfully submitted,

Date

By /[redacted]/

Timothy B. Clise (USPTO Reg. No. 40,957)
Attorney for Opposer
Clise, Billion & Cyr, P.A.
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Suite 300
Minneapolis, MN 55441
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Facsimile: (763) 587-7086

EXHIBIT A

Int. Cl.: 30

Prior U.S. Cl.: 46

United States Patent and Trademark Office

Reg. No. 3,534,927

Registered Nov. 18, 2008

TRADEMARK
PRINCIPAL REGISTER

Flackers

DR IN THE KITCHEN, LLC (MINNESOTA LIMITED LIABILITY COMPANY), DBA DOCTOR IN THE KITCHEN,
5017 BEARD AVENUE SOUTH
MINNEAPOLIS, MN 55410

FOR: CRACKERS, IN CLASS 30 (U.S. CL. 46).

FIRST USE 6-13-2008; IN COMMERCE 6-13-2008.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 77-235,171, FILED 7-20-2007.

GIANCARLO CASTRO, EXAMINING ATTORNEY

EXHIBIT B

Then
2005

Rx Dr. Alison Levitt, M.D.
: Good Food is Wise Medicine℠

Savory Flax Crackers

FLACKERS™

Made with Organic Ingredients

Rich in Omega 3 Fatty Acids • Anti-oxidants • Fiber • Protein • Low Carb

DeliciousNutritious!™

Now
2010

Nutrition Facts

Serving Size 3 flackers (25g)
Servings Per Container About 6

Amount Per Serving	
Calories 110	Calories from Fat 70
	% Daily Value*
Total Fat 8g	12%
Saturated Fat 0g	0%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 90mg	4%
Total Carbohydrate 8g	3%
Dietary Fiber 7g	28%
Sugars 0g	
Protein 5g	
Vitamin A 2% •	Vitamin C 0%
Calcium 4% •	Iron 8%

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Saturated Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: Organic Flax Seeds, Organic Apple Cider Vinegar, Vegetable Protein from Soybeans and Purified Water, Organic Garlic, Organic Onion, Organic Chili Pepper, Organic Basil

Certified Organic by MCIA

Dr. In The Kitchen, LLC.
P.O. Box 24868
Minneapolis, MN 55424-0868
www.drinthekitchen.com

Doctor Kitchen™

flackers™
flax seed crackers

high in omega-3 fatty acids
gluten free
raw
7g fiber
5g protein
values are per serving

made with: organic flax seeds
organic herbs and spices

NET WT. 5 OZ (142 g)

EXHIBIT C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of U.S. Trademark Application No. 77/320,480

For the mark: FLACKERS

Published for Opposition on 11 May 2010

Dr. In The Kitchen, LLC.

OPPOSER,

v.

Ocean Deli Ltd.

APPLICANT.

OPPOSITION NO. _____

AFFIDAVIT

This affidavit is filed in support of the above Notice of Opposition. Donn Kelly, a member of Dr. Kitchen (Opposer), on the best of his belief and understanding, hereby avers:

1. I, Donn Kelly, am a member of the Opposer, Dr. In the Kitchen, LLC.

2. The Opposer sells and promotes crackers under the FLACKERS mark.

3. The Opposer sells crackers under the FLACKERS mark in at least states of Arizona, California, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, and Wisconsin.

4. The Opposer sells crackers under the FLACKERS mark in on-line stores.

Respectfully submitted,

Donn Kelly

6-7-10

Date

EXHIBIT D

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of U.S. Trademark Application No. 77/320,480

For the mark: FLACKERS

Published for Opposition on 11 May 2010

Dr. In The Kitchen, LLC.

OPPOSER,

v.

Ocean Deli Ltd.

APPLICANT.

OPPOSITION NO. _____

AFFIDAVIT

This affidavit is filed in support of the above Notice of Opposition. Dr. Alison Levitt, on the best of her belief and understanding, hereby avers:

1. I, Dr. Alison Levitt, am a member of the Opposer, Dr. In the Kitchen, LLC.

2. I developed health foods, including crackers, beginning in the summer of 2004.

3. I, with the assistance of a business partner, selected the brand and trademark FLACKERS near the end of 2004.

4. In early 2005, a graphic designer was hired to develop packaging for our foodstuffs with the FLACKERS mark.

5. In early 2005, we had prototype and presented our FLACKERS branded crackers to stores in the Minneapolis area, including The Wedge Coop and Whole Foods.

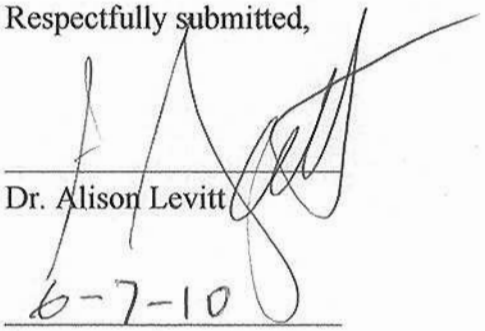
6. At least as earlier as March 2005, I was promoting and selling FLACKERS branded crackers directly to consumers.

7. In early 2005, I entered an agreement with a commercial kitchen to make FLACKERS branded crackers.

8. The FLACKERS mark has been in continuous use by me or my companies since 2005.

9. FLACKERS branded goods are sold in at least 16 states.

Respectfully submitted,



Dr. Alison Levitt

6-7-10

Date

CERTIFICATE OF SERVICE

I, TIMOTHY CLISE, hereby certify that I served a true and complete copy of the Notice of Opposition upon the below attorney representing Applicant, Ocean's Deli, via First-Class Mail, postage-prepaid on 7 June 2010.

To: TANYA M. REITZEL
COASTAL TRADEMARK SERVICE
BOX 12109
2200-555 WEST HASTINGS STREET
VANCOUVER; BRITISH COLUMBIA
V6B4N6
CANADA

/ [redacted] /

Timothy Clise