

April 11, 2006

**VIA FIRST CLASS MAIL**

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**TTAB**

Re: Notice of Opposition  
of United States Trademark  
Registration No.: 2,885,125  
Registrant: ZoneChefs LLC  
Mark: ZONE CHEF  
Class: 29, 30, 39

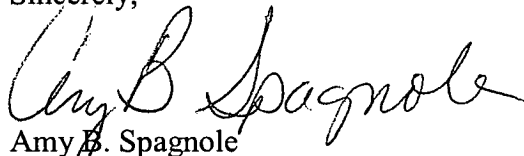
78/177279

Dear Madam:

The following documents are submitted in connection with U.S. Registration No. 2,885,125, filed by ZoneChefs LLC, for the mark ZONE CHEF in International Classes 29, 30 and 39 on the Principal Register:

1. Opposer Barry D. Sears, Ph.D.'s Opposition to Applicant ZoneChefs, LLC's Motion to Dismiss Pursuant to Fed. R. Civ. P. Rule 12(b)(6), with Exhibit 1 (Amended Notice of Opposition with Exhibits 1-9);
2. Certificate of Mailing dated April 11, 2006;
3. Certificate of Service dated April 11, 2006; and
4. Return postcard.

Sincerely,

  
Amy B. Spagnole

Enclosures

cc: Deborah L. Benson (w/o Encl.)  
Keith A. Weltsch (w/ Encl.)



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04-14-2006

U.S. Patent & TMOc/TM Mail Rcpt Dt. #34

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

_____	)	
BARRY D. SEARS Ph.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 92045370
	)	
ZONECHEFS, LLC,	)	Mark:    ZONECHEF
	)	Serial No.: 2,885,125
Respondent.	)	Classes:    29, 30, 39
_____	)	

**PETITIONER BARRY D. SEARS PH.D.'S OPPOSITION  
TO RESPONDENT ZONECHEFS LLC'S MOTION TO  
DISMISS PURSUANT TO FED. R. CIV P. RULE 12(b)(6)**

Petitioner Barry D. Sears Ph.D. ("Petitioner" or "Dr. Sears"), hereby submits this Opposition to Respondent ZoneChefs LLC's ("Respondent" or "ZoneChefs") Motion to Dismiss For Failure to State A Claim And, In The Alternative, Motion for a More Definite Statement ("Respondent's Motion"). Although Respondent's Motion is entitled "Motion to Dismiss for Failure to State A Claim," this title is misleading in that Respondent's Motion is **not** a motion to dismiss the **entire** Notice of Opposition but, rather, a **partial** motion to dismiss only with regard to certain of Petitioner's trademark applications as listed in "Table A" of the Respondent's Motion, which applications were filed after the filing date of the subject application. Respondent claims that the Notice of Opposition must be dismissed as to these applications because such applications do not have priority over the application for ZONE CHEFS that is the subject of this opposition. Respondent's partial motion to dismiss must be denied because Petitioner has properly pled facts sufficient to allege that Petitioner is the owner of a family of ZONE marks

and, thus, is not required to allege that each and every member of the family has a priority date that precedes the filing date of the subject application of ZONE CHEFS.

**I. Respondent's Motion for Partial Dismissal Should Be Denied Because Petitioner Has Alleged Sufficient Facts To State A Claim Upon Which Relief May Be Granted**

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is well taken only when the plaintiff has failed to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Such motion to dismiss is a test solely of the legal sufficiency of the complaint. Libertyville Saddle Shop Inc. v. E. Jeffries & Sons Ltd., 22 U.S.P.Q.2d 1994 (T.T.A.B. 1992). In order to withstand such a motion, a pleading need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought therein. Lipton Industries, Inc. v. Ralston Purina Company, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982). In considering Respondent's Motion the Board must accept as true the factual allegations of the Petition for Cancellation [and] construe all reasonable inferences therefrom in favor of the Petitioner. Baroid Drilling Fluids Inc. v. Sun Drilling Products, 24 U.S.P.Q.2d 1048 (T.T.A.B. 1992). In reviewing a Petition for Cancellation in connection with a motion to dismiss, the Board construes the allegations therein liberally, as required by Fed. R. Civ. P. 8(f). See TBMP 503.02.

Viewing the Petition for Cancellation in the light most favorable to Dr. Sears as the plaintiff, and resolving every doubt in his favor, it is abundantly clear that Dr. Sears has sufficiently asserted a claim upon which relief may be granted. Petitioner has properly pled facts sufficient to allege that Petitioner is the owner of a family of ZONE marks and, thus, is not

required to allege, as Respondent contends, that each and every member of the family has a priority date that precedes the filing date of the subject application of ZONE CHEFS.

A party opposing registration of a trademark pursuant to Lanham Act's Section 13, 15 U.S.C. 1063, must demonstrate both standing and a statutory ground which negates Respondent's entitlement to registration, and, at pleading stage, Petitioner must allege facts in support of both. 37 C.F.R. § 2.104(a) ("The opposition must set forth a short and plain statement showing why the Petitioner believes it would be damaged by the registration of the opposed mark and state the grounds for opposition."). Respondent's motion to dismiss does not dispute Petitioner's standing to maintain the proceeding. The motion charges only that Petitioner has not pled facts which, if proved, would establish grounds for refusing registration to Respondent.

In particular, Respondent claims that Petitioner has failed to establish valid grounds for denying the registration sought with regard to "many of the alleged "ZONE Marks" that have been pled by Petitioner" because applications for such marks -- those specifically listed in "Table A" of Respondent's Motion -- were filed subsequent to October 23, 2002, the filing date of the subject application of ZONE CHEFS, and Petitioner has not filed a Statement of Use or Amendment to Allege Use alleging a date of first use that precedes October 23, 2002 in connection with such applications and, therefore, Respondent is entitled to partial dismissal of the Petition for Cancellation on the grounds that the Petitioner does not have priority with respect to these specific marks. See Respondent's Motion to Dismiss for Failure to State a Claim, and, In the Alternative, Motion for a More Definite Statement, p. 10.

Respondent's argument is misplaced, as Petitioner has sufficiently pleaded in his Petition for Cancellation that he is the owner of a family of marks all containing the common distinctive

element ZONE and that, prior to Respondent's filing of the subject application for registration of ZONE CHEFS, many of the marks containing the claimed family feature ZONE were used and promoted together by Petitioner in such a manner as to create public recognition with and an association of common origin predicated on the family feature. J&J Snack Foods Corp. v. McDonald's Corp., 18 U.S.P.Q.2d 1889 (C.A.F.C. 1991). Specifically, the Petition for Cancellation provides:

2. Since 1995, Petitioner has used the trademark ZONE and composite marks, all incorporating ZONE as the dominant portion thereof, such as ZONE LABS, ZONENET, ZONE CAFÉ, ZONE CUISINE, ZONE SKIN CARE, ZONERX, and DR. SEARS ZONE, in connection with a wide variety of branded health and nutrition products and services, including print and electronic publications, educational and counseling services, meal delivery services, prepared foods, vitamins and supplements, meal replacements bars and drinks, skin care products and restaurant and café services. Such use has been ongoing and continuous. (Petition for Cancellation ¶ 2)

9. Since creation of his hormonal control/insulin balanced program, Dr. Sears has provided a wide array of health and nutrition products and services that are compliant with this program under the trademark ZONE and composite trademarks all containing ZONE as the dominant portion thereof, including, but not limited to, ZONE, ZONE CUISINE, ZONE CAFÉ, ZONE SKIN CARE, ZONERX, ZONE LABS, ZONENET and ZONE SHAKES (the "ZONE Marks"). (Petition for Cancellation ¶ 9)

10. Dr. Sears is well known as the source of ZONE branded products and services. (Petition for Cancellation ¶ 10)

16. In addition to his ZONE branded books, Dr. Sears and his ZONE branded health and nutrition products and services are widely known from his numerous and frequent live and taped appearances, including seminars, conferences, radio shows, and network television interviews, throughout the country. (Petition for Cancellation ¶ 16)

17. In promoting his ZONE branded health and nutrition products and services, Dr. Sears has appeared on nationally-broadcast television shows, including *The Today Show* in 1996 and again in January 2005, *20/20* in 1999, *Good Morning America* on June 9, 2000, June 15, 2000 and again in May 2002, *Dateline* in July 2002, *CBS Evening News* on May 21, 2003, *The Montel Williams Show* on April 1, 2004 and *Live With Regis and Kelly* on February 2, 2005. (Petition for Cancellation ¶ 17)

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