

ESTTA Tracking number: **ESTTA475970**

Filing date: **06/04/2012**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Atlantic Capes Fisheries, Inc.		
Entity	Corporation	Citizenship	New Jersey
Address	985 Ocean Dr. Cape May, NJ 08204 UNITED STATES		

Attorney information	John Christopher Christopher & Weisberg, P.A. 200 E. Las Olas Boulevard Suite 2040 Fort Lauderdale, FL 33301 UNITED STATES ptomail@cwiplaw.com Phone:(954) 828-1488		
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Registration Subject to Cancellation

Registration No	3536673	Registration date	11/25/2008
Registrant	Brown, Michael P.O. Box 1574 5375 Crawford Road Langley, WA 98260 UNITED STATES		

Goods/Services Subject to Cancellation

Class 029. First Use: 2007/11/00 First Use In Commerce: 2007/11/00 All goods and services in the class are cancelled, namely: Tuna fish
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Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act section 2(d)
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Mark Cited by Petitioner as Basis for Cancellation

U.S. Application No.	85228981	Application Date	01/28/2011
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	HY SEAS		

Design Mark	
Description of Mark	The mark consists of the words "Hy Seas" in the color red. Between the words "Hy" and "Seas" there is a drawing of a seagull in the color red.
Goods/Services	Class 029. First use: First Use: 1995/09/01 First Use In Commerce: 1995/09/01 Clam juice; Clams; Clams; Frozen appetizers consisting primarily of chicken or seafood; Frozen pre-packaged entrees consisting primarily of seafood; Marinated Clams and Seafood; Pre-packaged dinners consisting of Clams and Seafood; Prepared entrees consisting primarily of seafood; Prepared food kits composed of meat, poultry, fish, seafood, and/or vegetables and also including sauces or seasonings, ready for cooking and assembly as a meal; Processed seafood, namely, fish; Seafood; Seafood, namely, Clams, Scallops; Seafoods boiled down in soy sauce (tsukudani); Seasoned Clams and Seafood; Shellfish; Short-necked clams; Tinned seafood

Attachments	85228981#TMSN.jpeg (1 page)(bytes) Petition for Cancellation.pdf (5 pages)(32768 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	/John Christopher/
Name	John Christopher
Date	06/04/2012

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

In re: Registration No. 3,536,673
Issued: November 25, 2008
For: HIGH SEAS GOURMET ALBACORE TUNA

ATLANTIC CAPES FISHERIES, INC.
a New Jersey Corporation

Petitioner,

v.

MICHAEL BROWN, Individually

Registrant.

PETITION FOR CANCELLATION

Atlantic Capes Fisheries, Inc., a New Jersey corporation having a principal place of business at 985 Ocean Drive, Cape May, NJ 08204 (hereinafter “Petitioner”), believes that it may be damaged by the continued registration of the mark HIGH SEAS GOURMET ALBACORE TUNA as shown in Trademark Registration No. 3,536,673, owned by MICHAEL BROWN (hereinafter “Registrant”), and hereby petitions to cancel the registration under 15 U.S.C. § 1064. The grounds for cancellation are as follows:

1. Registrant obtained a registration on the Principal Register for the mark HIGH SEAS GOURMET ALBACORE TUNA for “tuna fish” (“Registrant’s mark”). Registrant’s mark is based on an application filed April 14, 2008 and asserts a first use date of November 30, 2007 (by virtue of Registrant choosing “00” as the day in November of first use).
2. Petitioner began using the mark HY SEAS and design in connection with, among other things “seafood” in interstate commerce at least as early as 1997.

3. On January 28, 2011 Petitioner filed application Serial No. 85/228,981 in the United States Patent and Trademark Office to register HY SEAS for, among other things, seafood.

4. Petitioner has been, and is being damaged, because registration of Petitioner's mark in application Serial No. 85/228,981 has been refused under Section 2(d) of the Trademark Act because of Registrant's mark.

5. Petitioner adopted and commenced use of its HY SEAS mark as a trademark long before Registrant adopted or used the HIGH SEAS GOURMET ALBACORE TUNA mark. Petitioner's continued usage of the mark HY SEAS as a trademark commenced at least as early as 1995, twelve (12) years prior to the first use date alleged in Registrant's application. Since that time, Petitioner has continued to use its HY SEAS mark. Thus, Petitioner has priority over Registrant with respect to the mark at issue. Although Registrant's website states that "High Seas Tuna began its history in the early 1960's," see <http://www.highseastuna.com/about.html>, there is no evidence that Registrant was selling any goods under the trademark HIGH SEAS GOURMET ALBACORE TUNA in commerce, nor did Registrant's assert as much to the USPTO, see ¶1 above in which Registrant claimed a date of first use in commerce of 2007.

6. Registrant's mark HIGH SEAS GOURMET ALBACORE TUNA is similar in meaning, sound, appearance and significance to Petitioner's HY SEAS mark as applied to Petitioner's goods identified herein. In particular, the terms "gourmet albacore tuna" in Petitioner's mark are descriptive and non-source identifying, such that the "High Seas" portion of Registrant's mark is the source identifying feature. When Registrant's "High Seas" portion of its mark is compared to Petitioner's HY SEAS mark, they are virtually identical and confusingly similar. *See In re Mighty Leaf Tea*, 94 USPQ2d 1257, 1260-61

(Fed. Cir. 2010); *see also* TMEP 1207.01(b)(iii) (“[L]ikelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding...a term that is descriptive or suggestive of the named goods or services; if the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences”); *see also* TMEP 1207.01(b)(ii) (“marks may be confusingly similar in appearance despite the addition, deletion, or substitution of letters or words.”).

7. The goods identified by Registrant’s mark, tuna fish, are closely related to the goods identified in Petitioner’s HY SEAS application and used in conjunction with Petitioner’s mark since 1997, namely, seafood. Registrant uses the designation HIGH SEAS GOURMET ALBACORE TUNA on goods that compete directly and indirectly with goods sold and offered by Petitioner under its HY SEAS mark such that confusion is likely.

11. The continued registration of Registrant’s HIGH SEAS GOURMET ALBACORE TUNA designation for tuna fish will likely cause confusion among the relevant consuming public, and will likely cause the relevant consuming public to mistakenly conclude that Registrant’s goods are associated with the Petitioner, when in fact they are not.

12. The continued registration of Registrant’s HIGH SEAS GOURMET ALBACORE TUNA designation is likely to cause injury to Petitioner’s business reputation and to injure and impair Petitioner’s rights in the HY SEAS trademark by causing confusion, mistake, and/or deception as to the respective rights of the parties and as to the source or sponsorship of such goods.

17. Petitioner is likely to continue to be damaged by the existence of Registration No. 3,536,673 in that Petitioner’s use and/or registration of the mark HY SEAS may be limited by the continued registration of said mark of Registrant.

18. Continued registration of Registration No. 3,536,673 will result in damage to Petitioner under the provisions of Section 2 of the U.S. Trademark Act, 15 U.S.C. § 1052, pursuant to the allegations stated above.

19. The \$300.00 filing fee for this Petition for Cancellation is being paid by credit card in conjunction with this filing.

WHEREFORE, Petitioner asks that Registration No. 3,536,673 be cancelled.

Dated: June 4, 2012

Respectfully submitted,

/John Christopher/
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Garrett Barten, hereby certify that on this 4th day of June, 2012, the foregoing Petition for Cancellation was filed electronically via ESTTA and was served on Michael Brown, P.O. Box 1574, 5375 Crawford Road, Langley, WA 98260 via U.S. Mail.

Date: June 4, 2012

By: /Garrett Barten/
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