

ESTTA Tracking number: **ESTTA423385**

Filing date: **08/04/2011**

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	Pastry Art Bake Shoppe, LLC		
Entity	Limited Liability Company	Citizenship	Alabama
Address	1927 29th Avenue South Birmingham, AL 35209 UNITED STATES		

Attorney information	Michael S. Denniston Bradley Arant Boult Cummings LLP 1819 Fifth Avenue North Birmingham, AL 35203 UNITED STATES mdenniston@babco.com Phone:2055218244		
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Registration Subject to Cancellation

Registration No	3926228	Registration date	03/01/2011
Registrant	Metabusiness International 304 Whitetail Drive Chagrin Falls, OH 440224133 UNITED STATES		

Goods/Services Subject to Cancellation

Class 030. First Use: 2009/05/14 First Use In Commerce: 2009/05/14 All goods and services in the class are cancelled, namely: Bakery goods; Bakery products, namely, sweet bakery goods; Mixes for bakery goods; Mixes for making baking batters; Muffins
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Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act section 2(d)
Dilution	Trademark Act section 43(c)

Mark Cited by Petitioner as Basis for Cancellation

U.S. Application No.	77745172	Application Date	05/27/2009
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	BABY BITE		

Design Mark	BABY BITE
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 2006/06/01 First Use In Commerce: 2006/06/01 bakery goods

Attachments	77745172#TMSN.jpeg (1 page)(bytes) BHM-#2189479-v3-Pastry_Art_Cancellation.pdf (7 pages)(23711 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	/michael s. denniston/
Name	Michael S. Denniston
Date	08/04/2011

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

PASTRY ART BAKE SHOPPE, LLC)	
)	
Petitioner,)	
)	
v.)	Cancellation No. _____
)	
)	Reg. No.: 3,926,228
METABUSINESS INT’L CORP.)	Reg. Date: March 1, 2011
)	Mark: BABY BITES
Registrant.)	
)	

PETITION FOR CANCELLATION OF REGISTRATION NUMBER 3,926,228

Petitioner, Pastry Art Bake Shoppe, LLC (“Petitioner”), an Alabama limited liability company having its principal office at 1927 29th Avenue South, Birmingham, AL 35209, hereby petitions for the cancellation of Registration Number 3,926,228 (“the ‘228 Registration”) for the mark BABY BITES. To the best of petitioner’s knowledge, the name and address of the current owner of the ‘228 Registration is Metabusiness International (“Registrant”), an Ohio corporation located at 304 Whitetail Drive, Chagrin Falls, Ohio 24133.

Petitioner believes that it is and will be damaged by the above-identified registration, and hereby petitions to cancel the same. The grounds for cancellation are as follows:

1. Petitioner is a bakery and bake shop located in Birmingham, Alabama. It is engaged primarily in the sale of fine bakery goods.

2. Prior to the filing date of the '228 Registration, and prior to any date of use to which Registrant can claim the benefit with respect to the '228 Registration, Petitioner adopted and began use of the term BABY BITE (or alternatively BABY BITES) in connection with its baked goods and other related products and services.

3. Petitioner markets and sells "BABY BITES," small baked goods or smaller versions of larger specialty cakes, to the general public.

4. Petitioner first used the mark BABY BITE in commerce to identify its "BABY BITES" products as early as June 1, 2006. Petitioner has since used the BABY BITE mark continuously for baked and/or bakery goods and other related products.

5. On March 9, 2009, Registrant filed an "intent to use" application, Serial No. 77/686,798 ("the '798 Application"), pursuant to Section 1(b) of the Federal Trademark Act for the mark BABY BITES. The goods and services listed in the application are "Bakery goods; Bakery products, namely, sweet bakery goods; Mixes for bakery goods; Mixes for making baking batters; Muffins." Registrant's filing status under Section 1(b) as "intent to use" demonstrates that Registrant was not using the mark BABY BITES in commerce at the time Registrant filed the '798 Application.

6. Registrant later amended its application for the mark BABY BITES to allege use in commerce, and provided a date of first use in commerce of at least as early as May 14, 2009.

7. On March 27, 2009, Petitioner filed federal trademark Application Serial No. 77/745,172 ("the '172 Application") for the mark BABY BITE with the USPTO, identifying the goods as "bakery goods." The '172 Application indicated that Petitioner's first use of the mark in commerce was as early as June 1, 2006.

8. On March 16, 2010, the USPTO examiner suspended action on Petitioner's '172 Application, citing Registrant's March 9, 2009, application as a potential bar to Petitioner's application.

9. Registrant's registered mark issued on March 1, 2011, as the '228 Registration. By Office Action of April 12, 2011, the USPTO examiner refused registration of Petitioner's '172 Application. The cited grounds for refusal was a likelihood of confusion with the '228 Registration pursuant to Section 2(d) of the Trademark Act.

10. By virtue of Petitioner's own use, the Petitioner is entitled to the benefit of the consumer recognition of the names and marks "BABY BITE" and "BABY BITES" as associated with its baked goods.

11. Registrant's mark, BABY BITES, is confusingly similar to Petitioner's names and marks, BABY BITE and BABY BITES.

12. Registrant's mark so resembles Petitioner's previously used names and marks so as to be likely to cause confusion, mistake, or deception, when applied in the U.S. to the goods set forth in Registrant's application, as to the source, origin, or sponsorship of Registrant's goods within the meaning of Section 2(d) of the Trademark Act due to Petitioner's prior use of a similar mark.

13. Accordingly, Petitioner believes that it is or will be damaged by the continued existence of the '228 Registration on the Principal Register at least in part due to: (a) the creation of a likelihood of confusion between the mark that is the subject of the '228 Registration and the previously-used mark of Petitioner, for which Petitioner has filed for registration and for which Petitioner enjoys priority; (b) dilution of the distinctive character of the BABY BITE mark of Petitioner, which became known with reference to

Petitioner at a time prior to the filing of the application of Registrant's '228 Registration and prior to Registrant's use of that mark; and (c) the misleading of purchasers into believing use of the mark shown in the '228 Registration refers to goods and or services of Petitioner.

14. Petitioner accordingly hereby petitions to cancel the '228 Registration. This petition is filed within five years from the date of the registration of the '228 Registration.

COUNT ONE

FOR CANCELLATION OF REGISTRATION NUMBER 3,926,228

15. Petitioner adopts the allegations of paragraphs 1 through 14 above as if fully set forth herein.

16. Petitioner first used the names and marks BABY BITE and BABY BITES in commerce to identify its bakery goods products as early as June 1, 2006, and has since used those names and marks continuously for baked and/or bakery goods and other related products.

17. Registrant is the owner of Registration Number 3,926,228 for the mark BABY BITES for "Bakery goods; Bakery products, namely, sweet bakery goods; Mixes for bakery goods; Mixes for making baking batters; Muffins."

18. Registrant had not used and was not using the mark BABY BITES in commerce at the time Registrant filed its application for trademark on March 9, 2009.

19. Registrant did not first use the mark BABY BITES in commerce until May 14, 2009, almost three years after Petitioner's first use of the mark BABY BITE.

20. Upon information and belief, Registrant has not and is not currently selling any baked goods, bakery products or related products under the registered BABY BITES mark.

21. Petitioner has a priority of use of the names and marks “BABY BITE” and “BABY BITES” for use with bakery goods, bakery products, and related products.

22. The mark BABY BITES is a close approximation to, and in meaning and effect is the same as, the Petitioner’s names and marks “BABY BITE” and “BABY BITES.”

23. The ‘228 Registration and the mark shown therein are likely to cause confusion, or to cause mistake, or to deceive in light of the prior-used BABY BITE and BABY BITES names and marks, and further dilutes and is likely to dilute the distinctiveness of the prior-used BABY BITE and BABY BITES names and marks.

24. The use by Registrant of the mark BABY BITES under the ‘228 Registration misleads potential purchasers and relevant persons into believing that the use refers to the goods sold by Petitioner.

Prayer for Relief

25. Continued registration of the ‘228 Registration would cause damage to Petitioner, and cancellation of the ‘228 Registration is requested pursuant to Section 13(a) of the Lanham Act.

26. Continued presence on the Principal Register of the ‘228 Registration does and will further cause additional damage to Petitioner in light of the fact that such registration was used as a basis to prevent further rightful registration of Petitioner’s mark BABY BITE and therefore, cancellation of the ‘228 Registration is requested pursuant to Section

14(3) of the Lanham Act on such other bases as may be available, including, without limitation, Section 2(d) of the Lanham Act. 15 U.S.C. 1052(d).

27. Petitioners reserve the right to add additional grounds following or during discovery.

28. Applicant submits this petition for cancellation with appropriate payment in the amount of \$300, for the filing by one petitioner against the single class that is the subject of Registration Number 3,926,228. The undersigned further authorizes the drawing of any underpayment from deposit account 50-0954 for which the undersigned is an authorized user.

WHEREFORE, Petitioners request that this Cancellation be sustained and that Registration Number 3,926,228 be cancelled.

Respectfully submitted this 4th day of August, 2011,

/Michael S. Denniston/
Michael S Denniston
Attorney for Petitioner
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CERTIFICATE OF SUBMISSION VIA ESTTA

I hereby certify that the foregoing Petition for Cancellation of Registration Number 3,926,228 is being transmitted to the Trademark Trial and Appeal Board via the ESTTA system on August 4, 2011.

Date: 8/4/2011

/Michael S. Denniston/

Michael S. Denniston, Esq.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing Petition for Cancellation of Registration Number 3,926,228 on

Metabusiness International
304 Whitetail Drive
Chagrin Falls, Ohio 44022-4133

By placing the same in the United States Mail, first class postage prepaid, and addressed to the owner of record of the registration at the correspondence address of record in the United States Patent and Trademark Office, on this 4th day of August, 2011.

/Michael S. Denniston/

OF COUNSEL