

ESTTA Tracking number: **ESTTA735129**

Filing date: **03/22/2016**

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	E.A. Sween Company		
Entity	Corporation	Citizenship	Minnesota
Address	16101 West 78th Street Eden Prairie, MN 55344 UNITED STATES		

Attorney information	Stephen R. Baird Winthrop & Weinstine, P.A. 225 South Sixth Street Suite 3500 Minneapolis, MN 55402 UNITED STATES trademark@winthrop.com, sbaird@winthrop.com, dpabian@winthrop.com		
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**Registrations Subject to Cancellation**

Registration No	4856524	Registration date	11/17/2015
Registrant	Van's International Foods, Inc. Suite D-142 Phoenix, AZ 85016 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 030. First Use: 2014/09/01 First Use In Commerce: 2014/09/01 All goods and services in the class are cancelled, namely: Waffles, French toast, pancakes
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**Grounds for Cancellation**

Priority and likelihood of confusion	Trademark Act section 2(d)		
Registration No	4856525	Registration date	11/17/2015
Registrant	Van's International Foods, Inc. Suite D-142 Phoenix, AZ 85016 UNITED STATES		

**Goods/Services Subject to Cancellation**


Class 030. First Use: 2014/09/01 First Use In Commerce: 2014/09/01 All goods and services in the class are cancelled, namely: Breakfast cereals; processed cereals; ready-to-eat cereals; crackers; granola-based snack bars; fruit-based energy bars; cereal-based energy bars
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**Grounds for Cancellation**

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

U.S. Application No.	86797961	Application Date	10/23/2015
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SIMPLY DELICIOUS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1994/03/00 First Use In Commerce: 1994/03/00 Bakery products		

U.S. Application No.	86797966	Application Date	10/23/2015
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SIMPLY DELICIOUS BAKERY		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1994/03/00 First Use In Commerce: 1994/03/00 Bakery products		

U.S. Application No.	86797973	Application Date	10/23/2015
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	SIMPLY DELICIOUS BAKERY		

Design Mark	
Description of Mark	The mark consists of SIMPLY DELICIOUS BAKERY in a yellow, stylized font surrounded by a yellow rectangle on a blue background.
Goods/Services	Class 030. First use: 1996/10/00 First Use In Commerce: 1996/10/00 Bakery products

Attachments	86797961#TMSN.png( bytes ) 86797966#TMSN.png( bytes ) 86797973#TMSN.png( bytes ) 11680208_1.pdf(212962 bytes ) 11680230_1.pdf(41652 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	/David H. Pabian/
Name	David H. Pabian
Date	03/22/2016

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

E.A. Sween Company	)	
	)	
	)	
	)	
	)	
vs.	)	Cancellation No. _____
	)	
Van's International Foods, Inc.	)	
	)	
Respondent.	)	
	)	

**PETITION TO CANCEL**

E.A. Sween Company (“Petitioner”), a Minnesota corporation, having a principal place of business at 16101 West 78<sup>th</sup> Street, Eden Prairie, Minnesota 55344, believes that it is and will continue to be damaged by the continued registration of the marks VAN’S SIMPLY DELICIOUS, Registration Number 4,856,524, and VAN’S SIMPLY DELICIOUS, Registration Number 4,856,525, (collectively, “Respondent’s Simply Delicious Marks”) and hereby petitions to cancel the same pursuant to the provisions of 15 U.S.C. § 1064.

The grounds for cancellation are as follows:

1. Van’s International Foods, Inc. (“Respondent”) is the record owner of U.S. Reg. No. 4,856,524 for the mark VAN’S SIMPLY DELICIOUS in connection with “*Waffles, French toast, pancakes*” in Int’l Class 30 and U.S. Reg. No. 4,856,525 for the mark VAN’S SIMPLY DELICIOUS in connection with “*Breakfast cereals; processed cereals; ready-to-eat cereals; crackers; granola-based snack bars; fruit-based energy bars; cereal-based energy bars*” in Int’l Class 30.

2. Respondent has represented to the USPTO that Respondent first used the mark depicted in U.S. Reg. No. 4,856,524 in connection with “*Waffles, French toast, pancakes*” anywhere and in commerce on September 1, 2014.

3. Respondent filed the application that matured into U.S. Reg. No. 4,856,524 on August 6, 2014.

4. U.S. Reg. No. 4,856,524 issued on November 17, 2015, within five years of the date of this Petition to Cancel.

5. Respondent has represented to the USPTO that Respondent first used the mark depicted in U.S. Reg. No. 4,856,525 in connection with “*Breakfast cereals; processed cereals; ready-to-eat cereals; crackers; granola-based snack bars; fruit-based energy bars; cereal-based energy bars*” anywhere and in commerce on September 1, 2014.

6. Respondent filed the application that matured into U.S. Reg. No. 4,856,525 on August 6, 2014.

7. U.S. Reg. No. 4,856,525 issued on November 17, 2015, within five years of the date of this Petition to Cancel.

8. Petitioner applied to register its marks SIMPLY DELICIOUS, U.S. Application No. 86/797,961, SIMPLY DELICIOUS BAKERY, U.S. Application No. 86/797,966, and SIMPLY DELICIOUS BAKERY & Design, U.S. Application No. 86/797,973 (collectively, “Petitioner’s Simply Delicious Marks”) on October 23, 2015.

9. Since at least as early as March of 1994, Petitioner has continuously used in commerce Petitioner’s SIMPLY DELICIOUS and SIMPLY DELICIOUS BAKERY marks in connection with a variety of food products, including “*Bakery products*” in Int’l Class 30 (“Petitioner’s Bakery Goods”).

10. Since at least as early as October of 1996, Petitioner has continuously used in commerce Petitioner's SIMPLY DELICIOUS BAKERY & Design mark in connection with Petitioner's Bakery Goods.

11. Upon information and belief, Respondent cannot claim a date of first use for U.S. Reg. No. 4,856,524 prior to the claimed first use date of September 1, 2014.

12. Upon information and belief, Respondent cannot claim a constructive first use date for U.S. Reg. No. 4,856,524 prior to the application date of August 6, 2014.

13. Upon information and belief, Respondent cannot claim a date of first use for U.S. Reg. No. 4,856,525 prior to the claimed first use date of September 1, 2014.

14. Upon information and belief, Respondent cannot claim a constructive first use date for U.S. Reg. No. 4,856,525 prior to the application date of August 6, 2014.

15. Petitioner first used Petitioner's Simply Delicious Marks in commerce long before Respondent first used Respondent's Simply Delicious Marks.

16. Petitioner has expended considerable time, effort, and expense in promoting, advertising, and popularizing Petitioner's Simply Delicious Marks in connection with Petitioner's Bakery Goods.

17. The purchasing public has come to know, rely upon, and recognize Petitioner's Simply Delicious Marks as strong indicators of the source of Petitioner's Bakery Goods.

18. Petitioner has established valuable goodwill in Petitioner's Simply Delicious Marks.

19. Petitioner has priority of common law rights in Petitioner's Simply Delicious Marks in connection with Petitioner's Bakery Goods.

20. Petitioner has standing in this proceeding and its belief in damage is reasonable because the USPTO cited Respondent's Simply Delicious Marks against registration of Petitioner's Simply Delicious Marks in Section 2(d) Office Action Refusals issued on February 23, 2016 ("USPTO Office Actions").

21. Consistent with the USPTO Office Actions, "*Waffles, French toast, pancakes*" and "*Breakfast cereals; processed cereals; ready-to-eat cereals; crackers; granola-based snack bars; fruit-based energy bars; cereal-based energy bars*" ("Respondent's Simply Delicious Goods") are overlapping with, closely related, and in some cases, identical to Petitioner's Bakery Goods.

22. Consistent with the USPTO Office Actions, Respondent's Simply Delicious Marks so resemble Petitioner's Simply Delicious Marks as to be likely, when used in connection with Respondent's Simply Delicious Goods, to cause confusion, mistake, or to deceive.

23. Consistent with the USPTO Office Actions, Petitioner's Simply Delicious Goods and Respondent's Simply Delicious Goods are of a kind that consumers would expect to originate from a single source under a single mark.

24. Consistent with the above allegations, purchasers and prospective purchasers are likely to mistakenly believe that Respondent's Simply Delicious Goods are sponsored, endorsed, or approved by Petitioner, or are in some way affiliated, connected, or associated with Petitioner, all to the detriment of Petitioner.

25. The continued registration of Respondent's Simply Delicious Marks further damages Petitioner, as the registrations confer upon Respondent various statutory presumptions to which it is not entitled in view of Petitioner's prior use of Petitioner's Simply Delicious Marks.

26. Registration of Respondent's marks should therefore be cancelled under 15 U.S.C. §§ 1052(d) and 1064.

WHEREFORE, pursuant to Section 14 of the Lanham Act, 15 U.S.C. § 1064, Petitioner respectfully requests that the Trademark Trial and Appeal Board sustain this Petition to Cancel and cancel U.S. Registration Nos. 4,856,524 and 4,856,525.

Dated: March 22, 2016

Respectfully Submitted,

WINTHROP & WEINSTINE, P.A.



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