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Filing date: **07/12/2016**

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

Proceeding	92063374
Party	Defendant Van's International Foods, Inc.
Correspondence Address	VANS INTERNATIONAL FOODS INC PO BOX 3901 PEORIA, IL 61612 UNITED STATES
Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Jeffrey T. Baravetto
Filer's e-mail	jeffrey.baravetto@tysonfoods.com, docket@hillshirebrands.com
Signature	/Jeffrey T. Baravetto/
Date	07/12/2016
Attachments	Vans Motion to Set Aside Default Judgement.pdf(202704 bytes )

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

Registration Nos.: 4,856,524; 4,856,525  
Trademarks: VAN'S SIMPLY DELICIOUS  
Registered: November 17, 2015

E.A. SWEEN COMPANY,	)	
	)	
Petitioner	)	Proceeding No. 92063374
	)	
v.	)	
	)	
VAN'S INTERNATIONAL FOODS	)	
	)	
Registrant	)	
_____	)	

**REGISTRANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT**

Registrant, Van's International Foods hereby respectfully moves the Trademark Trial and Appeal Board ("TTAB") to set aside the Judgment of Default entered on July 11, 2016, and accept and enter Registrant's Answer, which is filed concurrently with this motion. In support of its motion, Registrant submits the following:

Factual Background

1. On March 22, 2016, Petitioner E.A. Sween Company filed a Petition for Cancellation against Registrant's U.S. Reg. Nos. 4,856,524 & 4,856,525 for VAN'S SIMPLY DELICIOUS. According to the Certificate of Service, Petitioner sent a copy of the Petition to Cancel via first class mail to: Van's International Foods, Inc., Suite D-142, 2525 E. Arizona

Biltmore Circle, Phoenix, AZ 85016.<sup>1</sup> This is the address listed on the USPTO record, however, it is no longer an active address and Registrant has not updated the USPTO record.

2. On April 4, 2016, Petitioner submitted a Notice of Return of Service Copy as Undeliverable, noting that the service copy of the Petition to Cancel sent to the above address was returned as undeliverable, and that the returned copy identified a forwarding address of: Van's International Foods, 501 S. 107<sup>th</sup> Ave., Tolleson, AZ 85353-9445. Petitioner did not indicate whether they attempted to re-send the service copy to this forwarding address.

3. On April 7, 2016, the TTAB issued a notice that it found a new address for Registrant: Van's International Foods, Inc., PO Box 3901, Peoria, IL 61612. The Petition to Cancel was mailed to this address.

4. On May 31, 2016, no Answer had been filed by Registrant and a notice of default was entered against Registrant under Fed. R. Civ. P. 55(a).

5. On July 11, 2016, the Board entered a Judgment by Default against Respondent and granted the Petition to Cancel.

~~6. The necessary individuals at Registrant did not receive notice of the present~~  
cancellation proceeding. The Phoenix, Arizona address, which is the address listed in the USPTO records and where the first notice was sent, is no longer valid. The Post Office box address in Peoria, Illinois is used for consumer affairs purposes, not legal or trademark matters. After discovery of this proceeding on July 7, 2016, Registrant conducted further investigation and determined that the notice was received at the Peoria address, but never reached the appropriate individuals.

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<sup>1</sup> Petitioner's Certificate of Service is titled "Certificate of Service by E-mail," but nothing in the certificate itself indicates Petitioner sent Notice of the Petition to Cancel by e-mail, and Registrant received no such notice by e-mail at the e-mail address listed in the USPTO record.

7. Notably, Registrant did not receive notice of this proceeding from either Petitioner or the Board at the e-mail address listed in the Correspondence Information on the USPTO website. The email, [doCKET@hillshirebrands.com](mailto:doCKET@hillshirebrands.com), is active and functional. Even after receiving notice that mail delivery was returned as undeliverable Petitioner did not attempt service via e-mail.

8. Registrant did not have any knowledge of this proceeding until July 7, 2016, when a trademark paralegal of Registrant was reviewing trademark records of other Van's International Foods marks and happened upon the VAN'S SIMPLY DELICIOUS marks, and noticed that they were the subject of a TTAB proceeding.

9. On July 8, 2016, a Friday, Registrant contacted the Interlocutory Attorney to inform them of the facts detailed above, and indicated that Registrant would be filing a Motion to Vacate the Notice of Default. The Judgment of Default was entered on the following Monday, July 11, 2016, the next business day.

10. Counsel for Registrant also attempted to contact counsel on July 8, 2016, and left a voice message for counsel for Petitioner with the details of the situation and requested that they consent to this motion. Petitioner's counsel never responded.

#### Legal Standard

11. Pursuant to Trademark Trial and Appeal Board Manual Procedure ("TBMP") 312.03, a judgment of default will only be set aside in accordance with Fed. R. Civ. P. 60(b). Per Rule 60(b), the Board may relieve a party from a judgment of default for a variety of reasons, but the relevant one in this instance is in the case of "mistake, inadvertence, surprise, or excusable neglect." The motion must also be made within a reasonable time, not more than one year after judgment is entered. *Id.*

12. The factors to be considered in determining a motion for relief from default judgment are: (1) whether the plaintiff will be prejudiced; (2) whether the default was willful; and (3) whether the defendant has a meritorious defense to the action.” TBMP 312.03.

13. The facts above set forth the mistake and inadvertence that led to the entry of default. Additionally, Registrant’s motion under Fed. R. Civ. P. 60(b)(1) is filed one day after the Board entered default judgment, which clearly is a reasonable time.

14. Registrant can sufficiently make a good cause showing why it should be granted relief from the judgment of default. First, Petitioner will not be prejudiced by setting aside the default judgment. There has been no delay that would prejudice Petitioner as the delay has been only just over two months (Registrant’s Answer was due 5/1/2016). To the extent Petitioner has pending trademark applications that may be affected by the outcome of this proceeding, the applications could be stayed pending the resolution of this proceeding. Thus, there is no prejudice to Petitioner here.

15. Second, the default was not willful. The facts are detailed above, but the bottom line is that the proper individuals at Registrant had no notice of the current proceeding.

Registrant acknowledges that the Correspondent address in the USPTO records was out of date, however, the e-mail address listed for Correspondent on the USPTO records is accurate and functioning. Although Petitioner knew that mail service had been ineffective, based on the record no attempt at service by e-mail was made.

16. Registrant’s failure to act in this case was not willful, but rather the result of mistake and inadvertence. Had Registrant been properly aware of this proceeding it would undoubtedly filed a timely Answer, as evidenced by the fact that upon discovery of this

proceeding on July 7, 2016, Registrant promptly prepared and filed this Motion to Set Aside Notice of Default and Answer on July 13, 2016, only three business days later.

17. Third, Registrant is likely to succeed in this proceeding on the merits. Petitioner alleges a likelihood of confusion between its SIMPLY DELICIOUS trademark applications and Registrant's VAN'S SIMPLY DELICIOUS registered trademark. Registrant's mark begins with its well-known house mark, VAN'S, which makes confusion unlikely. The only similar terms shared by Petitioner and Registrant's marks are the non-dominant portion: "simply delicious," which includes the descriptive term "delicious."

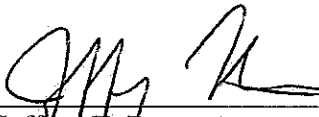
18. Finally, default judgments for failure to timely answer are not favored by law; trial on the merits is favored over default judgment. *Information Systems and Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993) ("Rule 60(b) is applied most liberally to judgments in default.").

19. Good cause exists to set aside this judgment for the reasons set forth above. While Registrant did have an out-of-date address on the USPTO records, this fact alone should not result in the cancellation of two of its valuable trademark registrations. Registrant acted promptly as soon as it received notice of this proceeding.

20. Registrant respectfully submits that it has sufficiently demonstrated that it should receive relief from the default judgment, and respectfully requests that the Board grant this Motion and allow the cancellation proceeding to proceed so an ultimate decision could be made on the merits.

Respectfully submitted,

**VANS INTERNATIONAL FOODS**



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Jeffrey T. Baravetto  
Counsel for Registrant

Date: July 12, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing REGISTRANT'S MOTION TO SET ASIDE NOTICE OF DEFAULT has been serviced on the Attorney of Record for Petitioner, by mailing said copy on July 12, 2016, via First Class Mail, postage prepaid to:

Stephen R. Baird  
Winthrop & Weinstein PA  
225 South Sixth Street, Suite 3500  
Minneapolis, MN 55402

  
Christene A. Casey

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