

ESTTA Tracking number: **ESTTA740647**

Filing date: **04/18/2016**

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	Idahoan Foods, LLC		
Entity	Limited Liability Company	Citizenship	Delaware
Address	357 Constitution Way Idaho Falls, ID 83402 UNITED STATES		

Attorney information	Preston C. Regehr TechLaw Ventures, PLLC 3290 West Mayflower Way Lehi, UT 84043 UNITED STATES pto@techlawventures.com Phone:801-805-3688		
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Registration Subject to Cancellation

Registration No	4000266	Registration date	07/26/2011
Registrant	Kettle Foods, Inc. 3125 Kettle Ct., SE Salem, OR 973015572 UNITED STATES		

Goods/Services Subject to Cancellation

Class 029. First Use: 2009/10/19 First Use In Commerce: 2009/10/19 All goods and services in the class are cancelled, namely: Potato chips

Grounds for Cancellation

Abandonment	Trademark Act section 14
Priority and likelihood of confusion	Trademark Act section 2(d)

Marks Cited by Petitioner as Basis for Cancellation

U.S. Registration No.	2969189	Application Date	04/28/2003
Registration Date	07/19/2005	Foreign Priority Date	NONE
Word Mark	LOADED BAKED		

Design Mark	LOADED BAKED		
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 2001/08/23 First Use In Commerce: 2001/08/23 Dehydrated potatoes and mashed potato mix		

U.S. Application No.	86444730	Application Date	11/04/2014
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	IDAHOAN FULLY LOADED		
Design Mark	IDAHOAN FULLY LOADED		
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 0 First Use In Commerce: 0 Instant potatoes; processed potatoes; dehydrated potatoes; processed and dehydrated potatoes		

U.S. Registration No.	814136	Application Date	05/04/1965
Registration Date	08/30/1966	Foreign Priority Date	NONE

Word Mark	IDAHOAN		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U046 (International Class 001, 005, 029, 030, 031, 032). First use: First Use: 1951/12/00 First Use In Commerce: 1951/12/00 [FRESH, FROZEN,] DEHYDRATED[,] AND PROCESSED POTATOES		

U.S. Registration No.	2833787	Application Date	10/02/2002
Registration Date	04/20/2004	Foreign Priority Date	NONE

Word Mark	IDAHOAN		
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Design Mark	<h1>IDAHOAN</h1>
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 2002/10/31 First Use In Commerce: 2003/03/31 sauces and mixes, namely, [gravy,] seasonings, coatings, and sauces for use with potatoes, [vegetables and meats]

U.S. Registration No.	2819044	Application Date	10/21/2002
Registration Date	03/02/2004	Foreign Priority Date	NONE

Word Mark	IDAHOAN
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Design Mark	
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Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2000/09/30 First Use In Commerce: 2000/09/30 dehydrated potatoes and mashed potato mix

U.S. Registration No.	4202585	Application Date	12/12/2007
Registration Date	09/04/2012	Foreign Priority Date	NONE

Word Mark	IDAHOAN FOODS
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Design Mark	<h1>IDAHOAN FOODS</h1>
Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 2010/02/28 First Use In Commerce: 2010/07/31 Instant potatoes; processed potatoes; dehydrated potatoes; dehydrated and processed potatoes; potato flakes; potato slices; processed potato mixes

Attachments	76510076#TMSN.png(bytes) 86444730#TMSN.png(bytes) Idahoan_Petition for Cancellation.pdf(3704338 bytes) 76454697#TMSN.png(bytes) 76460507#TMSN.png(bytes) 77350177#TMSN.png(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	/Preston C. Regehr/
Name	Preston C. Regehr
Date	04/18/2016

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

In the Matter of Registration No.: 4,000,266
Owned by Kettle Foods, Inc. for the Mark: FULLY LOADED BAKED POTATO
Registered: July 26, 2011

IDAHOAN FOODS, LLC,
Petitioner,

v.

KETTLE FOODS, INC.,
Registrant.

Cancellation No.: _____

PETITION FOR CANCELLATION OF REGISTRATION

Idahoan Foods, LLC (“Petitioner”), believes that it has been and will continue to be damaged by U.S. Registration No. 4,000,266 which was filed October 23, 2009, on the basis of actual use of the mark under 15 U.S.C. § 1052(a), and registered July 26, 2011, for the trademark “FULLY LOADED BAKED POTATO”, with a disclaimer of “baked potato”, for use with “potato chips” (“Kettle’s Registration”), which is registered to Kettle Foods, Inc. (the “Registrant”). Petitioner Idahoan petitions to cancel Kettle’s Registration under the provisions of 15 U.S.C. §§ 1064 and 1052(d) on grounds of that (i) it has been abandoned, (ii) the USPTO erred in registering Kettle’s Registration, and/or (iii) Kettle’s Registration infringes Petitioner’s registered trademark rights.

As grounds for cancellation, Petitioner asserts that:

1. Petitioner is a limited liability company organized under the laws of the State of Delaware, having a business address at 357 Constitution Way, Idaho Falls, ID 83402-3538, and is engaged in business of manufacturing, distributing, and selling instant potatoes, dehydrated potatoes, or processed and dehydrated potatoes, or mashed potato mixes. Petitioner, or its

predecessors in title and interest, have manufactured and sold those products for more than instant potatoes, dehydrated potatoes, or processed and dehydrated potatoes, or mashed potato mixes, including under its “IDAHOAN” brand.

2. Petitioner owns, uses, and has continuously used with the goods indicated, the following trademark registrations for marks that are or include the word “IDAHOAN”:

-- U.S. Registration No. 0,814,136, which registered under 15 U.S.C. §1052(f) on August 30, 1966 for the mark “IDAHOAN” and has been renewed for use with “processed potatoes”;

-- U.S. Registration No. 2,833,787, which registered under 15 U.S.C. §1052(f) on April 29, 2004 for the mark “IDAHOAN” and has been renewed for use with “sauces and mixes, namely, seasonings, coatings, and sauces for use with potatoes” in International Class 30;

-- U.S. Registration No. 2,819,044, which registered in part under 15 U.S.C. §1052(f) on March 2, 2004 for the “IDAHOAN” and design logo, for use with “dehydrated potatoes and mashed potato mix” in International Class 29, which design mark was substantially based on the older design mark in U.S. Registration No. 2,183,734 which registered August 25, 1998 for use with “dehydrated potatoes and mashed potato mix” in International Class 29; and

-- U.S. Registration No. 4,202,585 which registered in part under 15 U.S.C. §1052(f) on September 4, 2012, for the mark “IDAHOAN FOODS” for use with “Instant potatoes; processed potatoes; dehydrated potatoes; dehydrated and processed potatoes; potato flakes; potato slices; processed potato mixes” in International Class 29.

3. Petitioner also owns and uses other federal trademark applications and

registrations for marks which include “IDAHOAN” as part of the mark.

4. Petitioner owns, uses, and has continuously used U.S. Registration No. 2,969,189 which registered July 19, 2005, for the mark “LOADED BAKED” for use with “dehydrated potatoes and mashed potato mix” in International Class 29, and for which Section 8 and 15 Declarations have been duly filed and acknowledged by the USPTO (“Petitioner’s LOADED BAKED Mark”)

5. On November 4, 2014 Petitioner filed with the USPTO an intent-to-use application assigned Serial No. 86/444,730 for the mark “IDAHOAN FULLY LOADED” for use with “instant potatoes; processed potatoes; dehydrated potatoes; processed and dehydrated potatoes” in International Class 29 (“Petitioner’s Application”). The USPTO has issued a final refusal to register Petitioner’s Application, citing the Kettle’s Registration as the only bar to registration, under 15 U.S.C. §1052(d).

6. On information and belief, Registrant is a corporation organized under the laws of the State of Oregon with an address of record for that registration at 3125 Kettle Ct., SE, Salem, OR 97301-5572 and manufactures potato chip products. Registrant does not manufacture, and has never manufactured or sold instant potatoes, dehydrated potatoes, or processed and dehydrated potatoes, or mashed potato mixes.

I. Abandonment of Kettle’s Registration

7. Since at least as early as October 20, 2015, the Registrant has listed Kettle’s Registration for “FULLY LOADED BAKED POTATO” mark for its potato chip product, as a “retired flavor” on its website: http://www.kettlebrand.com/retired_flavors/. See Exhibit A for a true and correct copy of that web page. That webpage has a copyright notice with a date of 2009 as the last revision date of that webpage.

8. On information and belief, Registrant has not sold any potato chips or other product in commercial quantities under Kettle’s Registration, since 2009, which is more than six years ago.

9. Upon information and belief, since listing Kettle's Registration on its "retired flavors" webpage, and since at least as early as December 31, 2009, Registrant has not intended to resume bona fide use of Kettle's Registration with the registered goods, or with any goods or services.

10. On information and belief, Registrant has abandoned its mark "FULLY LOADED BAKED POTATO", and Kettle's Registration.

II. Kettle's Registration was Registered in Error by the USPTO

11. Kettle's Registration, which is for the mark "FULLY LOADED BAKED POTATO" for use with "potato chips", has been cited as a bar to Petitioner's Application for the mark "IDAHOAN FULLY LOADED" for use with "instant potatoes; processed potatoes; dehydrated potatoes; processed and dehydrated potatoes", but Petitioner's LOADED BAKED Mark, which has been registered and in use before and during all of the Registrant's use and registration of Kettle's Registration, was not cited by the USPTO against Kettle's Registration.

12. Registration of a mark for use with potato chips can under 15 U.S.C. §1052(d) currently prevent registration of a mark with instant potatoes, processed potatoes, and dehydrated potatoes, but an application for potato chips was allowed to register using a mark that wholly included a prior registered mark which was for use with instant potatoes, processed potatoes, and dehydrated potatoes. The USPTO has not been consistent in its application of the standards 15 U.S.C. §1052(d).

13. Kettle's Registration wholly includes Petitioner's LOADED BAKED Mark.

14. The USPTO applied 15 U.S.C. §1052(d) inconsistently with respect to (a) Kettle's Registration and Petitioner's LOADED BAKED Mark, and (b) Kettle's Registration relative to Petitioner's Application.

15. The USPTO erred in failing to cite Petitioner's LOADED BAKED Mark against Kettle's Registration, and erred in registering Kettle's Registration.

III. Kettle's Registration Infringes Petitioner's Rights

16. Petition has never licensed the Registrant to use, nor consented to the Registrant's use of, Petitioner's LOADED BAKED Mark, including as Petitioner's LOADED BAKED Mark

is wholly included in Kettle's Registration.

17. Both Petitioner's products and the Registrant's products are sold through grocery and other retail food stores, directly to consumers, and frequently or typically in the same stores.

18. If Kettle's Registration were currently in use by or through the Registrant, such use would cause confusion, mistake, or deception in the minds of the relevant members of the consuming public.

19. Petitioner has been and will continue to be damaged by the continued registration, and any use or future use, of Kettle's Registration for "FULLY LOADED BAKED POTATO" for potato chips, because registration provides Registrant with *prima facie* evidence of the exclusive right to use Petitioner's LOADED BAKED Mark with Kettle's Registration for potato chips, and falsely implies sponsorship, affiliation, and endorsement of the Registrant by Petitioner relative to Kettle's Registration.

20. Petitioner has been and will continue to be damaged by the continued registration of the "FULLY LOADED BAKED POTATO" Registration for potato chips because it prevents Petitioner from registering with the USPTO the Application for its mark "IDAHOAN FULLY LOADED".

WHEREFORE, Petitioner prays that Kettle's Registration be cancelled, that the Petition to Cancel be sustained, and that judgment be rendered in favor of Petitioner, and that Petitioner's Application be approved for publication for opposition.

The filing fee in the amount of \$300 as required by 37 C.F.R. § 2.6(a)(16) is submitted.

Respectfully submitted,


Preston C. Regehr
Benjamin D. Stanley
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Lehi, Utah 84042

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the PETITION FOR CANCELLATION has been served via First Class Mail to Registrant at its address of record with the USPTO, which is shown below, on this 18th day of April, 2016:

Kettle Foods, Inc.
3125 Kettle Ct., SE
Salem, OR 98301-5572

with a copy to counsel of record in Kettle's Registration:

Jennifer A. Golinveaux
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111



Preston C. Regehr

EXHIBIT A

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Find your favorite product:

Retired Flavors

Looking for one of your Kettle Brand® favorites you haven't seen for awhile? Check out the Retired Flavors below and try one of the flavor suggestions that might become a new favorite!

Sweet Onion

Try out our newest flavors: Pepperoncini, Red Curry and Roasted Garlic! They'll satisfy your cravings for Spicy, Tangy and Savory!

Fully Loaded Baked Potato

Try out our new Maple Bacon Potato Chips! You'll find that smoky bacon flavor you miss-with a sweet note!

Baked Sour Cream & Onion

Try our regular Sour Cream and Onion Kettle Brand chips, our our newest baked chip, Olive Oil.

Krinkle Cut™ Zesty Ranch

You're in luck! Try our newest bold flavors like Dill Pickle or Carolina BBQ!

Krinkle Cut™ Cheddar & Sour Cream

Give our classic New York Cheddar Potato Chips flavor a try! This just might satisfy that cheesy craving!

Kettle Brand Nut Butters: Almond, Peanut, Cashew Hazelnut

Our nut butter line has been discontinued, but we suggest that you take the opportunity to try out some of our Kettle Brand® Potato Chips flavors!

Dill & Sour Cream

Check out our New York Cheddar Potato Chips-these might just satisfy your craving for creamy comfort food ! Enjoy!

Habanero Ginger

Try Spicy Thai™ Kettle Brand® Potato Chips, an innovative flavor with a balance of Thai cuisine's sweetness & spice and a ginger red pepper kick.

Island Jerk™

Our Jalapeño Kettle Brand® Potato Chips flavor might fill the void with a spicy bite of jalapeño peppers and a well rounded balance of spices.

Roasted Red Pepper with Goat Cheese

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GO

Tuscan Three Cheese

Try our New York Cheddar Potato Chips with a cheesy goodness that is hard to forget.