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

Proceeding	92051279
Party	Defendant Norm Oeding
Correspondence Address	ROBERT O. BLINN P.O. BOX 75155 WICHITA, KS 67275-0144 UNITED STATES rblinn@robertblinn.com
Submission	Opposition/Response to Motion
Filer's Name	Robert O. Blinn
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Signature	/robert o blinn/
Date	05/29/2010
Attachments	92051279DefResptoSJMotion.pdf (13 pages)(1144212 bytes)

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

RED HEN BREAD LLC,	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92/051,279
	:	(Reg. No. 3,614,763)
NORM OEDING,	:	
	:	
Registrant.	:	
_____	:	

REGISTRANT’S RESPONSE TO PETITIONER’S MOTION FOR
SUMMARY JUDGMENT

I. FACTS

On April 15, 2010, petitioner filed a “Motion for and Memorandum in Support of Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Petitioner accomplished service of process by first class mail. In support of this Motion for Summary Judgment, Petitioner provided a copy of a Red Hen Bread advertisement as Exhibit A and copies of pages from Petitioner’s website as Exhibits A through D. In its Motion for Summary Judgment, Petitioner argued there is no genuine issue as to any material fact in this proceeding. Also, with its Motion for Summary Judgment Petitioner presented an affidavit by Robert Picchietti. Petitioner also noted that Registrant filed application Serial Number 77/423,259 for his mark, LITTLE RED HEN BAKERY on March 16, 2008. The USPTO allowed Registrant’s application and issued Registration

Number 3,614,763 on May 5, 2009. When Petitioner attempted to register its mark by filing an application in the United States Patent and Trademark Office on April 6, 2009, a trademark office examiner responded by citing Registrant's application and refused Petitioner's application under section 2(d) of the Lanham Act. Petitioner now seeks cancellation of Registrant's registration and further seeks Summary Judgment from the board granting cancellation of Registration Number 3,614,763.

II. ARGUMENT

Petitioner, the moving party on summary judgment, carries the initial burden of establishing the absence of any genuine issue of material fact. *See TBMP section 528, Celotex, 447 U.S. 317.* Registrant respectfully submits there remain genuine issues of material fact relating to the Likelihood of Confusion between the two marks in question and relating to whether or not petitioner has actually been engaging in the continuous use of its mark from 1996 until the present.

A. Likelihood of Confusion:

Petitioner's motion provides the board with an analysis of the likelihood of confusion between the two marks. Petitioner correctly refers to *In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973)* as the source for the relevant factors needed by the board to find likelihood of confusion. However, Petitioner, in its motion, does not address several of the du Pont factors. The du Pont court provides factors 6, 7 and 8 which read as follows (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion.

and (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion. The du Pont court noted that “[t]he evidentiary elements are not listed above in order of merit. Each may from case to case play a dominant role.”

(1) The number and nature of similar marks in use on similar goods:

“The Little Red Hen” is a well known folk tale popularized in a well known version published by the Little Golden Books, a series of children’s books, sometime prior to 1960. In the story, the Little Red Hen grows wheat, produces flour and bakes bread using the flour. This popular narrative provides a popular motif for use by bakers or producers of baking related products who wish to adopt a mark including some reference to a Red Hen, perhaps invoking a positive association with the industrious, do-it-yourself work ethic of the title character. As such, Red Hen should not be seen as having the strength of a purely arbitrary mark such as, for example, Red Cow would have for Bread or baked goods. Thus, the Board, when considering likelihood of confusion in this proceeding should consider the number and nature of similar marks in use on similar goods. The number and nature of similar uses is most likely, in this case, arises from the popularity of the folk tale to which those uses make reference.

In this connection the Registrant asks the board to take notice of Registration Number 1498842 for THE LITTLE RED HEN for Bakery Goods in class 030 which was registered in 1988 and canceled in 1995. The registrant also asks the board to take notice of Registration Number 2267757 for RED HEN BREAD for mixes for baked goods in class 030 which was registered in 1999 and canceled in 2006. Attached as exhibits A and

B hereto are current web pages for two bakeries which appear to use trademarks which include a reference to Red Hen.

Exhibit A provides a copy of a computer screen shot which was obtained by viewing the first page the website for Red Hen Baking Co. of Vermont, www.redhenbaking.com. Exhibit B provides a current copy of the page displayed at the website www.twolittleredhens.com which appears to advertise a bakery in New York City called “Two Little Red Hens”. It is unlikely exhibits A and B provide a complete picture of all bakeries across the United States that use “Red Hen” in their business names or in their marks. The attorney for Registrant gathered these examples by means of a simple Google search and gathered these items with less than one hour of effort. Clearly, further factual inquiry is needed before the Board can properly consider this factor.

When considering the similarity of the marks, weight should be given the scope that should be accorded to the marks. Accordingly, the Registrant argues, in view of the number and nature of similar marks that appear to be in use on similar goods there is at least a genuine issue of material fact which goes to likelihood of confusion. Since the text RED HEN appears to be in use by a number of other similar businesses offering similar products, then it may be appropriate to give a mark used by a bakery containing the term “Red Hen” narrow scope. Thus, given the apparent number of other similar uses of RED HEN, and since the two marks in question share only the words “red” and “hen” and are different in other respects, it may be possible for the Board to consider LITTLE RED HEN BAKERY sufficiently dissimilar from RED HEN BREAD to avoid the likelihood of confusion sufficient to justify canceling Registrant’s registration.

(2) The nature and extent of any actual confusion

Registrant notes that the Petitioner has provided no evidence regarding the existence of any actual confusion between the two marks. On the other hand, Registrant provides herewith his attached statement wherein he states that he has received no communication from any of his customers regarding the existence of RED HEN BREAD in Chicago, Illinois.

(3) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion

Registrant has been producing and selling bread products under the LITTLE RED HEN BAKERY mark for nearly five years. As noted above, Registrant has received no communication from any of his customers regarding the existence of RED HEN BREAD in Chicago.

A. Continuous Use by Petitioner;

The declaration of Robert Picchietti, states that petitioner has been using RED HEN BREAD to identify its bakery products at all times from December 9, 1996 until the present. The petitioner has provided the board with a copy of a Chicago Sun Times article dated August 22, 1997, and a current copy of portions of petitioner's website. However, Petitioner has not provided documentary evidence showing its actual use of the RED HEN BREAD mark at all times from August 22, 1997 until the present. Aside from the declaration of one who is apparently an owner or corporate officer or managing

member of Red Hen Bread LLC, the Board has no direct evidence for establishing
Petitioner's continuous use of the RED HEN BREAD mark.

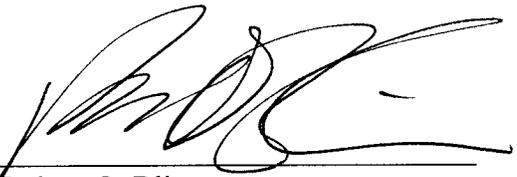
C. Conclusion:

Given the questions of fact which arise when considering the du Pont factors
noted above and the question of fact which remains when considering the alleged
continuous use of the RED HEN BREAD mark by Petitioner, Registrant respectfully
submits that he has submitted sufficient evidence and arguments to at least raise a
genuine issue of material fact in response to petitioner's motion for summary judgment.

Accordingly, Petitioner's motion for summary judgment should be denied.

Respectfully submitted,

Date: May 29, 2010


Robert O. Blinn

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

RED HEN BREAD LLC,	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92/051,279
	:	(Reg. No. 3,614,763)
NORM OEDING,	:	
	:	
Registrant.	:	
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DECLARATION OF NORM OEDING IN SUPPORT OF
REGISTRANT'S RESPONSE TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Norm Oeding, hereby declare that:

1. I am the sole proprietor of the Little Red Hen Bakery, with a business address of 15076 NW 180th Street, Newton, Kansas 67114.
2. I submit this Declaration in support of my response to Petitioner's Motion for Summary Judgment.
3. I am the owner of US Registration Number 3,614,763 for LITTLE RED HEN BAKERY for fresh, baked bread products in International Class 030.
4. I filed my application to register LITTLE RED HEN BAKERY on March 16, 2008 and the United States Patent and Trademark Office assigned it a Serial Number of 77/423,259.
5. My application was published for opposition on February 17, 2009 and was issued on May 5, 2009.

6. As sole proprietor of the Little Red Hen Bakery, I sell fresh, baked bread products that are labeled LITTLE RED HEN BAKERY.
7. Prior to receiving Petitioner's notice of cancellation, I had no knowledge of the existence of Red Hen Bread LLC of Chicago, Illinois, nor did I have any knowledge of their products or operations.
8. At no time during the conduct of my business have any of my customers communicated to me concerning the existence of Red Hen Bread of Chicago, Illinois.
9. I have no knowledge of any occurrence of actual confusion between the use of my LITTLE RED HEN BAKERY mark and the RED HEN BREAD mark used by the Petitioner.
10. At no time during the conduct of my business, to the best of my knowledge, information and belief, have I sold any fresh, baked bread product to a resident of the city of Chicago or any citizen of the state of Illinois.

I declare that all statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true; and further that the statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Respectfully submitted,

Date: 5-18-10

Norm Oeding
Norm Oeding

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

RED HEN BREAD LLC,	:	
	:	
Petitioner,	:	
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v.	:	Cancellation No. 92/051,279
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NORM OEDING,	:	
	:	
Registrant.	:	
_____	:	

DECLARATION OF ROBERT O BLINN IN SUPPORT OF
REGISTRANT'S RESPONSE TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

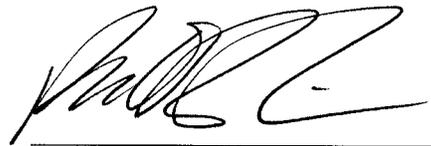
I, Robert O. Blinn, hereby declare that:

1. I am an attorney duly admitted to practice law in the State of Kansas.
2. I submit this Declaration in support of Registrant's brief in response to Petitioner's Motion for Summary Judgment.
3. Attached to this Declaration, as Exhibit A, is a true copy of the first page one sees when one accesses the web page www.redhenbakingcompany.com. This copy was obtained by performing a "print screen" function and then copying the material thus obtained into a Microsoft (R) word document. This was done on May 28, 2010.
3. Attached to this Declaration, as Exhibit B, is a true copy of the page one sees when one accesses the web page for www.twolittleredhens.com. This copy was made on May 28, 2010.

I declare that all statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true; and further that the statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Respectfully submitted,

Date: May 28, 2010



Robert O. Blinn

The screenshot shows a Mozilla Firefox browser window displaying the Red Hen Baking Company website. The browser's address bar shows the URL <http://www.redhenbaking.com/>. The website features a navigation menu with the following items: [Our Breads](#), [Our Pastries](#), [Café Menu](#), [Where to Buy](#), [Bakery & Café](#), and [Home](#). The main content area includes the Red Hen Baking Company logo, which is a circular emblem with a red hen and the text "RED HEN BAKING CO. Vermont Artisan Bakers". Below the logo is a photograph of a baker in a white apron using a wooden peel to lift several large, round, crusty loaves of bread from a wooden surface. A vertical text overlay on the right side of the photo reads "steeped in tradition - rooted in Vermont". At the bottom of the page, there are links for [Calendar](#) and [Our Mission](#). The browser's taskbar at the bottom shows several open applications, including "Red Hen Baking Com...", "Record List Display", "WPPER Public Reality", "RBLIWN - Outlook Exp...", and "Microsoft Word". The system tray on the right indicates the time is 12:06 PM.

Two Little Red Hens™
an American bakery



Cakes
Pies
Cupcakes

Scones
Muffins
& More...

*see our Special Occasion
Custom Cake Menu*

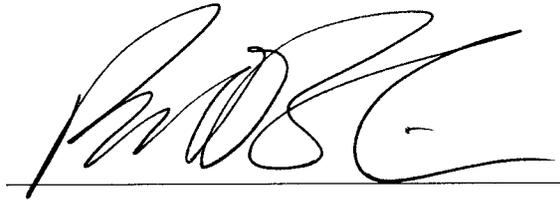
Yorkville/Upper East Side
1652 2nd Avenue (86th Street)
New York, NY 10028
(212) 452-0476

Store Hours
Mon - Fri 7am to 8pm
Saturday 8am to 8pm
Sunday 8am to 6pm

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CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of the foregoing REGISTRANT'S CROSS MOTION FOR SUMMARY JUDGMENT & BRIEF IN RESPONSE TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT, DECLARATION OF NORM OEDING and DECLARATION OF ROBERT O. BLINN IN SUPPORT OF REGISTRANT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT were served upon Petitioner by mailing same via First Class Mail, postage prepaid, to Kathryn Jennison Shultz, 2001 Jefferson Davis Highway, Suite 1102, Arlington, VA 22202, this 29th day of May, 2010.

A handwritten signature in black ink, appearing to read 'R. Blinn', written over a horizontal line.

Robert O. Blinn