

ESTTA Tracking number: **ESTTA391176**

Filing date: **02/01/2011**

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

Proceeding	92051279
Party	Plaintiff Red Hen Bread LLC
Correspondence Address	KATHRYN JENNISON SHULTZ JENNISON & SHULTZ, P.C. 2001 JEFFERSON DAVIS HIGHWAY, SUITE 1102 ARLINGTON, VA 22202 UNITED STATES kjs4jennisonlaw@aol.com, kjs@jennisonlaw.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Kathryn Jennison Shultz
Filer's e-mail	kjs@jennisonlaw.com, kjs4jennisonlaw@aol.com
Signature	/Kathryn Jennison Shultz/
Date	02/01/2011
Attachments	RED HEN cancellation motion for leave to amend.pdf (7 pages)(220130 bytes)

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

RED HEN BREAD, LLC,	:	
	:	
Petitioner,	:	Cancellation No. 92051279
	:	Reg. No. 3,614,763
v.	:	Mark: LITTLE RED HEN BAKERY
	:	
NORM OEDING	:	
	:	
<u>Registrant.</u>	:	

PETITIONER’S MOTION FOR LEAVE
TO AMEND THE PETITION TO CANCEL

Petitioner, Red Hen Bread, LLC, by counsel, hereby moves, pursuant to Trademark Rule 2.107 and Fed. R. Civ. P. 15(a), for leave to amend its petition to cancel to include the facts that support the new claim which were uncovered during discovery and facts that were recently learned after the close of the discovery period.

In support of this motion, Petitioner asserts that this motion is timely because it is filed prior to opening of Petitioner’s testimony period. Focus 21 International Inc. v. Pola Kasei Kogyo Kabushiki Kaisha, 22 USPQ2D 1316 (TTAB 1992). In Space Base, Inc. v. Stadis Corp., 17 USPQ2d 1216 (TTAB 1990), opposer filed motion to amend its pleading not prior to the opening of its testimony period but during its testimony period. The motion, nevertheless, was granted since interests of justice and judicial economy would best be served thereby.

As noted in TMEP Section 507.01, “The primary purpose of pleadings, under Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted.”

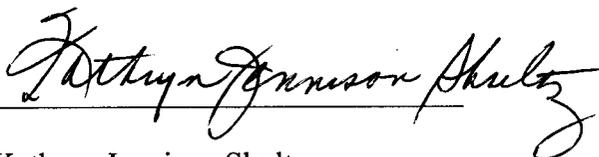
Generally speaking, if the Board proceeding is still in the pre-trial stage (i.e., in discovery, or prior to any testimony having been taken by the plaintiff in its testimony period), leave to amend, if otherwise appropriate, will be allowed. This is because if discovery is still open, or, if necessary, discovery is reopened prior to trial, there generally will be no prejudice to the adverse party as that party will have a full opportunity for discovery on the matters raised in the amended pleading, and amendment will provide for the full adjudication of the merits. The fact that the adverse party may be prejudiced as a result of delay to the proceedings is generally outweighed by the principle that there should be a full adjudication. See Beth A. Chapman, *TIPS FROM THE TTAB: Amending Pleadings: The Right Stuff*, 81 Trademark Rep. 302, 305, 306 (1991).

In view of the foregoing, it is submitted that the motion for leave to amend is well taken and that the AMENDED PETITION TO CANCEL submitted herewith should be accepted. Petitioner further requests suspension of this proceeding pending the disposition of the subject motion

Respectfully submitted,

RED HEN BREAD, LLC

Date: February 1, 2011

By: 

Kathryn Jennison Shultz
John N. Jennison
Carl E. Jennison
JENNISON & SHULTZ, P.C.
2001 Jefferson Davis Highway – Suite 1102
Arlington, Virginia 22202
Telephone: (703) 415-1640
Attorneys for Applicant

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

RED HEN BREAD LLC,	:	
	:	
Petitioner,	:	Cancellation No. 92051279
	:	(Registration No. 3614763)
v.	:	Mark: LITTLE RED HEN BAKERY
	:	
NORM OEDING,	:	
	:	
<u>Registrant.</u>	:	

AMENDED PETITION TO CANCEL

Red Hen Bread LLC, an Illinois limited liability company having its principal place of business at 250 N. Western Avenue, Chicago, Illinois 60612, believes that it is or will be damaged by Registration No. 3,614,763 and hereby petitions to cancel the same.

The grounds for cancellation are as follows:

1. The registrant Norm Oeding obtained a federal registration for the mark LITTLE RED HEN BAKERY (“Registrant’s Mark) for “fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes” in Class 30, claiming an August 29, 2005, first date of use and an August 29, 2005, first date of use in commerce. This registration is identified by Registration No. 3,614,763 with a May 5, 2009 registration date.
2. Petitioner has adopted and continuously used the trademark RED HEN BREAD since at least as early as December 9, 1996 to the present, in connection with bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries.

3. Petitioner has filed an application to register the mark RED HEN BREAD (“Petitioner’s Mark”) for “bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries” in International Class 30. This application, which is based on the petitioner’s use of this trademark in commerce in connection with the named goods in Class 30 since at least as early as December 9, 1996, was filed April 6, 2009, and is identified by Serial No. 77/707,868. The U.S. Patent and Trademark Office has refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because “of a likelihood of confusion with the mark in U.S. Registration No. 3,614,763 as to be likely to cause confusion, to cause mistake, or to deceive as to the source of the goods.”
4. There is no issue as to priority of use. Petitioner has continuously used its RED HEN BREAD trademark since at least as early as December 9, 1996, which is prior to the March 16, 2008 filing date for U.S. Trademark Application Serial No. 77/423,259, which matured into Registration No. 3,614,763, and prior to the August 29, 2005 first date of use alleged by the Registrant.
5. Petitioner has expended considerable effort and expense in promoting its RED HEN BREAD trademark and the goods sold under such mark, with the result that the purchasing public has come to know, rely upon, and recognize the goods of Petitioner by such mark.
6. The Registrant’s Mark and the Petitioner’s Mark contain the term “RED HEN.”

7. Bread, buns, bagels, bread rolls and baguettes are listed in the identification of goods for Registration No. 3,614,763 and for Trademark Application Serial No. 77/707,868.
8. In view of the similarities of the respective marks and the related nature of the goods of the respective parties, the Registrant's mark LITTLE RED HEN BAKERY so resembles Petitioner's mark RED HEN BREAD previously used in the United States, and not abandoned, as to be likely to cause confusion, or to cause mistake or to deceive.
9. Purchasers are likely to consider the goods of the Registrant advertised and promoted under the mark LITTLE RED HEN BAKERY as emanating from or associated with Petitioner, and purchase such services as those of the Petitioner. Any such confusion in trade inevitably would result in loss of sales to the Petitioner. Furthermore, any defect, objection or fault found with Registrant's goods marketed under its mark would necessarily reflect upon and seriously injure the reputation which the Petitioner has established for its RED HEN BREAD goods.
10. Registrant did not make use of the LITTLE RED HEN BAKERY mark on all of the goods identified in his use-based application at least as early as the filing date of the underlying application for Registration No. 3,614,763.
11. Registrant did not make use of the LITTLE RED HEN BAKERY as a trademark on all of the goods identified in Registration No. 3,614,763 in interstate commerce prior to or on the filing date of the underlying use-based application for Registration No. 3,614,763.

12. Registrant sold fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes identified by the LITTLE RED HEN BAKERY trademark only in locations in the State of Kansas prior to or on the filing date of the underlying use-based application for Registration No. 3,614,763.
13. Registrant did not sell or ship fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes identified by the LITTLE RED HEN BAKERY trademark outside of the State of Kansas prior to or on the filing date of the underlying use-based application for Registration No. 3,614,763.
14. Registrant has not sold, shipped or distributed fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes identified by the LITTLE RED HEN BAKERY trademark outside of the State of Kansas.
15. The continued existence of U.S. Registration No. 3,614,763 casts a cloud upon petitioner's right to continue to use, register and expand the use of its RED HEN BREAD trademark, all to the great injury of petitioner.

WHEREFORE, Petitioner deems that it is or will be damaged by Registration No. 3,614,763 and petitions for cancellation thereof.

Respectfully submitted,

RED HEN BAKERY LLC

Date: February 1, 2011

By: 

Kathryn Jennison Shultz
John N. Jennison
Carl E. Jennison
JENNISON & SHULTZ, P.C.
2001 Jefferson Davis Highway – Suite 1102
Arlington, Virginia 22202
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITIONER'S MOTION FOR LEAVE TO AMEND THE PETITION TO CANCEL and AMENDED PETITION TO CANCEL were served upon Registrant Norm Oeding, by forwarding same via First Class Mail, postage prepaid, to Registrant's counsel, Robert O. Blinn, P.O. Box 75144, Wichita, Kansas 67275-0144, this 1st day of February, 2011.

A handwritten signature in black ink, reading "Kathryn Jennison Shultz". The signature is written in a cursive style with a large initial "K" and a long, sweeping tail.

Kathryn Jennison Shultz