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

Proceeding	92051279
Party	Plaintiff Red Hen Bread LLC
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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.	)	
	)	
NORM OEDING,	)	
	)	
Respondent.	)	

PETITIONER'S REPLY BRIEF

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I. DESCRIPTION OF THE RECORD

Respondent did not take any testimony, did not file any notices of reliance and did not properly introduce any evidence during his trial period. Respondent did not properly introduce any evidence during his trial period to support his arguments. Arguments based on facts that are not of record should not be considered. Respondent has not introduced into any evidence to support his comment that RED HEN is a commonly used motif for bakeries and baked goods or that the mark appears to be in use by a number of other similar businesses offering similar products. Respondent has produced no evidence that supports his statement that he has been producing and selling bread products for nearly seven years or that he has received no communication from any of his customers regarding the existence of the petitioner's trade name and trademark.

As the Board has continuously advised, evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced during the appropriate trial period. See, for example, *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). Any mention or reference to exhibits which were attached to the Respondent's reply to the earlier motion for summary judgment should receive no consideration.

Respondent, on the other hand, has stipulated that Petitioner has priority and standing and that the marks in question contain the same words.

II. STATEMENT OF LAW AND REBUTTAL

Respondent has cited and relied on *In re Silenus Wines, Inc.*, 194 USPQ 261 (1977) to support his position that Respondent has used his mark in interstate commerce. This case is not on point. The sole issue in that case was whether the importation from France and intrastate sale of wine bearing the mark was "use in commerce." The Court held 'While appellant's importation is not itself a "use in commerce" by appellant, it is evidence that appellant's sale within Massachusetts was so intimately involved with foreign commerce as to become a "use in

commerce" as defined in the Lanham Act.' 194 USPQ at 264. There is no evidence that respondent's goods had formerly traveled in interstate or foreign commerce. If any transactions took place, they were solely intrastate.

With respect to the National Labeling and Education Act of 1990 (Public Law 101-535), there is no evidence of record that any labels or packaging of respondent's goods complied with this law. There is no evidence of record that customers outside of the state of Kansas purchased respondent's goods. There is no evidence of record to show that any intrastate transactions by respondent affected any interstate or foreign commerce. There is no evidence that any intrastate transactions by respondent substantially affected any interstate or foreign commerce.

III. CONCLUSION

It has been established, by stipulation, that Petitioner has priority and standing.

Respondent has presented no evidence to support his position that there is no likelihood of confusion between the marks LITTLE RED HEN BAKERY and RED HEN BREAD or to refute petitioner's position that there is a likelihood of confusion between the two marks when used in connection with petitioner's goods and the goods listed in the subject registration.

Because the petitioner's and respondent's marks are substantially similar, the petitioner's goods and the goods identified in the subject registration are identical and/or otherwise similar, and the goods are presumed to travel in the same channels of trade to the same classes of purchasers, there should be a finding, considering the *duPont* factors, that the respondent's mark is likely to cause confusion with petitioner's prior used trademark and trade name.

Because the respondent has admitted that he did not use the mark LITTLE RED HEN BAKERY on or in connection with all of the goods listed in the registration when the original use-based application was filed and because the respondent has admitted that he has only sold or

distributed his products to customers in the state of Kansas, he has not used his mark in interstate commerce as required by the statute. As a result, the subject registration should be deemed void *ab initio.*

Accordingly, petitioner respectfully requests the granting of its petition and the cancellation of the subject registration.

Respectfully submitted,

RED HEN BREAD LLC

Date: April 20, 2012

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITIONER'S REPLY BRIEF was served on the Respondent, by forwarding it via First Class Mail, prepaid, to his counsel of record, Robert O. Blinn, Esq., Erickson Kernell Derusseau & Kleypas LLC, P.O. Box 75144, Wichita, Kansas 67275-0144, this 20th day of April, 2012.

_____
Kathryn Jennison Shultz