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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
Correspondence Address	Kathryn Jennison Shultz Jennison & Shultz, P.C. 2001 Jefferson Davis Highway, Suite 1102 Arlington, VA 22202 UNITED STATES kjs4jennisonlaw@aol.com
Submission	Motion for Summary Judgment
Filer's Name	Kathryn Jennison Shultz
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Signature	/Kathryn Jennison Shultz/
Date	04/15/2010
Attachments	motion for summary judgment LITTLE RED HEN BAKERY.pdf (35 pages) (2068854 bytes)

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

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

PETITIONER'S MOTION FOR AND MEMORANDUM
IN SUPPORT OF SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Petitioner Red Hen Bread LLC, through its undersigned attorney, hereby moves the Honorable Trademark Trial and Appeal Board for an Order granting summary judgment in petitioner's favor, granting the petition and canceling Registration No. 3,614,763.

Petitioner's motion is being filed prior to the opening of testimony in this case and is therefore, timely and not made so as "to delay the trial."

SUMMARY JUDGMENT IS APPROPRIATE BECAUSE
THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment in its favor as a matter of law. There is no question that summary judgment is appropriate in actions before the Trademark Trial and Appeal Board. See, *Imperial Tobacco Ltd. v. Phillip Morris, Inc.*, 899 F.2d 1575, 1581, 14 USPQ2d 1390, 1394 (Fed. Cir. 1990); *Sweats Fashions, Inc. v. Pannill Knitting Company, Inc.*, 833 F.2d 1560, 1562, 4 USPQ2d 1793, 1795 (Fed. Cir. 1987).

The Board's function in deciding a motion for summary judgment is not to resolve factual issues, but simply to determine whether there is a genuine issue as to any material fact. *The Coach House Restaurant v. Coach and Six Restaurants*, 223 USPQ 176, 177 (TTAB 1984). While summary judgment should be granted cautiously, it is proper when no genuine issue of material fact exists, as in the present case. *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 739 F.2d 624, 626, 222 USPQ 741, 743 (Fed. Cir. 1984). "A dispute is genuine only if, on the entirety of the record, a reasonable jury could resolve a factual matter in favor of the non-movant." *Sweats Fashions, Inc.*, supra, 833 F.2d at 1562, 4 USPQ2d at 1795. Under appropriate circumstances, summary judgment is proper and has been encouraged in determination of likelihood of confusion. *Pure Gold, Inc.*, supra, 739 F. 2d at 627 n.2, 222 USPQ AT 744 n.2. Indeed, the U.S. Supreme Court has advocated summary judgment as a means of disposition designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

BACKGROUND OF OPPOSITION

On March 16, 2008, Registrant Norm Oeding filed an application to register the mark LITTLE RED HEN BAKERY for "fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes" in International Class 30. This application, which was identified by Serial No. 77/423,259, was filed based on an alleged August 29, 2005 first date of use. On May 5, 2009, this application matured into registration as Registration No. 3,614,763.

On April 6, 2009, Petitioner filed an application to register its RED HEN BREAD trademark for "bakery products, namely, bread, buns, bagels, bread rolls, baguettes,

croissants, cookies, muffins, scones, Danish, tarts and assorted pastries” in International Class 30 with the U.S. Patent and Trademark Office. This application, which is identified by Serial No. 77/707,868, is based on the petitioner’s continuous use of this trademark in connection with the named goods in commerce since at least as early as December 9, 1996. By office action dated June 23, 2009, registration of the petitioner’s mark was refused “because of a likelihood of confusion with the mark in U.S. Registration No. 3614763.” The examining attorney stated, “The applicant’s mark is RED HEN BREAD. The registered mark is LITTLE RED HEN BAKERY. The marks are likely to create the same commercial impression in the minds of consumers, as they share the common wording RED HEN.” The examining attorney further stated, “The goods of the parties are closely related in that the applicant and the registrant are both providing bakery goods including bread, buns, bagels, bread rolls and baguettes.”

Petitioner seeks summary judgment in its favor on the grounds of priority of use and likelihood of confusion with its pleaded mark. As demonstrated below, there is no genuine issue as to any material fact in this proceeding.

This motion is supported by this memorandum, the Declaration of Kathryn Jennison Shultz and the Declaration of Robert Picchiatti, President and CEO of Red Hen Bread LLC.

STANDING

“Standing is a threshold inquiry directed solely to establishing a plaintiff’s interest in the proceeding. The purpose in requiring standing is to prevent litigation where there is no real controversy between the parties, i.e. where a plaintiff is no more than a mere intermeddler.” *Harjo v. Pro Football Inc.*, 30 USPQ2d 1828, 1830 (TTAB 1994). “A

petitioner need only plead and prove “a real commercial interest in its own marks and a reasonable basis for its belief that it would be damaged.” In *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982), the court held that a rejection of an application by the examiner because of the respondent’s registration, which is challenged in the petition to cancel is sufficient to establish standing.

In *Cerveceria Modelo S.A de C.V. v. R.B. Marco & Sons, Inc.*, 55 USPQ2d 1298, 2000 WL 827785 (TTAB 2000), the Board held that the ex parte citation of a registration as a bar is sufficient to grant to the applicant standing to file a petition to cancel that registration. In *Great Seats, Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235,1239, 2007 WL 1740870 (TTAB 2007), the Board held – If A’s application was rejected on the ground of a §2(d) conflict with B’s registration, then A has standing to petition to cancel B’s registration.

As noted above, petitioner’s trademark application Serial No. 77/707,868 to register its RED HEN BREAD trademark was refused “because of a likelihood of confusion with the mark in U.S. Registration No. 3,614,763.” The cited registration is the subject of this cancellation proceeding. Shultz Declaration ¶ 3 and Ex. A.

No genuine issue of material fact exists on this issue.

PRIORITY

On March 16, 2008, Registrant Norm Oeding filed an application to register the mark LITTLE RED HEN BAKERY for “fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes” in International Class 30. This application, which was identified by Serial No. 77/423,259, was filed based on an alleged August 29,

2005 first date of use. On May 5, 2009, this application matured into registration as Registration No. 3,614,763.

Registrant admitted in its answer to the petition to cancel that the following is “true and correct statement”: The registrant Norm Oeding obtained a federal trademark 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.”

According to an article dated June 15, 2006, written by Kylene Orebaugh that appeared in the *High Plains/AG Journal*, the registrant Norm Oeding “has been marketing his own line of bread since September 2005 under the Little Red Hen Bakery label.” Shultz Declaration ¶ 4 and Ex. B. The registrant was interviewed for this article and is widely quoted in it.

Petitioner first adopted its mark RED HEN BREAD for use in commerce at least as early as December 9, 1996, to identify its bakery products, namely, fresh baked bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries. Petitioner has used its mark in commerce continuously since that date in connection with its bakery products and retail stores where these goods are sold. Picchietti Declaration ¶ 3. In addition to its use as a trademark, Petitioner has continuously used RED HEN BREAD as a trade name since December 9, 1996. Picchietti Declaration ¶ 4.

Petitioner's continuous use of its RED HEN BREAD trademark and trade name in commerce since December 9, 1996 predates any date claimed or alleged by registrant. The earliest possible date upon which registrant has relied for priority, August 29, 2005, occurred well after Petitioner's December 9, 1996, first date of continuous use of its RED HEN BREAD trademark and trade name. Therefore, there is no genuine issue of material fact as to priority.

ANALYSIS: LIKELIHOOD OF CONFUSION

Determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These pertinent factors of record overwhelmingly favor Petitioner to such a degree that there must be a finding of likelihood of confusion on summary judgment.

Similarities of the Goods

The determination of whether there is a likelihood of confusion must be based on the goods as they are identified in the involved registration, regardless of what the record may reveal as to the particular nature of a registrant's goods or services. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). In this case, the goods listed in the subject registration are "fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes." Petitioner uses, and has continued to use its RED HEN BREAD trademark on or in connection with its

bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, Danish, tarts and assorted pastries since at least as early as December 9, 1996. The goods for which registrant has obtained registration for the designation LITTLE RED HEN BAKERY are, indisputably, identical to the goods sold by petitioner under its RED HEN BREAD trademark. There is no genuine issue of material fact regarding the similarity of the parties' goods. They should be presumed identical. Hence, this *du Pont* factor overwhelming favors a finding of likelihood of confusion.

Channels of Trade

Where there is no limitation on the channels of trade in the identification of goods in the subject registration, it is presumed that the identification encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Continental Graphics Corp.*, 52 USPQ2d 1374, 1377 (TTAB 1999). Because the goods recited in the subject registration are identical to the ones sold by petitioner under its RED HEN BREAD trademark, the channels of trade must be deemed to be the same. Prospective purchasers of these bakery items are ones that can be deemed to be ordinary purchasers, who apply an ordinary standard of care to purchasing decisions. The goods are available to all potential customers. *Paula Payne Products Co. v. Johnson Publishing Co.*, 177 USPQ 76 (CCPA 1973). Hence, this *du Pont* factor favors a finding of likelihood of confusion.

Similarities of the Marks

“In cases such as this, where the applicant’s (registrant’s) goods are identical to the opposer’s (petitioner’s) goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the

goods were not identical.” *Barbara’s Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1288 (TTAB 2007). To determine whether the marks are similar for purposes of assessing the likelihood of confusion, we must consider the appearance, sound, connotation and commercial impression of each mark. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In a particular case, any one of these bases for comparison may be critical in finding marks to be similar. Petitioner’s mark is RED HEN BREAD and registrant’s mark is LITTLE RED HEN BAKERY. The dominant portion of the parties’ marks, i.e., RED HEN, is identical in appearance, and completely identical in sound and meaning. The remaining elements of registrant’s mark are either a modifier (LITTLE) of the dominant term (RED HEN) or descriptive and disclaimed (BAKERY). The additional element of the petitioner’s mark BREAD is generic for its goods and accordingly has little commercial significance. The addition of these terms for the respective goods offered under each mark does not serve to significantly distinguish the marks overall, particularly since the goods themselves are the same. “A particular feature of a mark may be more obvious or dominant, and therefore, when determining likelihood of confusion, greater weight ought to be given to the force and effect of such a feature.” *Kangol, Ltd. v. Kangaroo U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). “In comparing two marks to determine whether they are confusingly similar, this Circuit follows the rule that ‘if one word or feature of a composite trademark is the salient portion of the mark, it may be given greater weight than the surrounding elements.’” *Meridian Mutual Insurance Co. v. Meridian Insurance Group, Inc.*, 128 F.3d 1111, 44 USPQ2d 1545 (7th Cir. 1997). The similarities in sight, sound, connotation and commercial impression for LITTLE RED

HEN BAKERY for baked bread products and RED HEN BREAD for baked bread products are substantial.

The Court of Appeals for the Federal Circuit has held that when marks appear, as is the case herein, on “virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Under actual market conditions, consumers generally do not have the luxury of making side-by-side comparisons. The proper test in determining likelihood of confusion is not a side-by-side comparison of the marks, but rather, the decision must be based on the similarity of the general overall commercial impressions engendered by the involved marks. See *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980).

Based on the similarities in the sight, sound, connotation and commercial impression between the petitioner’s mark and the registrant’s mark, this *du Pont* factor favors a finding of likelihood of confusion.

CONCLUSION

There is no genuine issue of material fact remaining for trial with regard to opposer’s standing, claim of priority and likelihood of confusion between the petitioner’s mark and registrant’s mark. When the Board considers (a) the indisputable fact that the parties’ respective marks are highly similar in sight, sound, connotation and commercial impression with the identical dominant term RED HEN, (b) the indisputable fact that the parties’ respective goods as identified in the subject registration and the ones sold by the petitioner are identical, (c) the indisputable fact that the channels of trade for the parties’

respective goods are assumed to be identical; and (d) the indisputable fact that the purchasers of the parties' respective goods are assumed to be identical, the Board can only conclude that there is a likelihood of confusion. Therefore, for the foregoing reasons, petitioner respectfully requests that its motion is granted and that summary judgment is entered, granting the petition to cancel and canceling the subject registration.

Respectfully submitted,

RED HEN BREAD LLC

Date: April 15, 2010

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 Opposer

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

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

DECLARATION OF ROBERT PICCHIETTI
IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Robert Picchietti, hereby declare that:

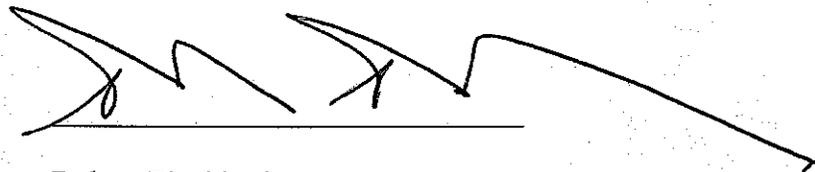
1. I am President of Red Hen Bread LLC, an Illinois limited liability, with a business address at 250 N. Western Avenue, Chicago, Illinois 60612.
2. I submit this Declaration in support of Petitioner's Motion for Summary Judgment.
3. At all times from and after December 9, 1996, Red Hen Bread LLC ("Petitioner") has been using the mark RED HEN BREAD to identify its bakery products including fresh baked bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, danish, tarts and assorted pastries.
4. In addition to its use as a trademark, Petitioner has used the name RED HEN BREAD as its business and trade name since at least as early as December 9, 1996.
5. Since December 9, 1996, Petitioner has continuously used its RED HEN BREAD mark on signage, menus, flyers, advertisements, packaging and on its internet website, among other things.
6. Attached to this Declaration as Exhibit A is a true and complete copy of an advertisement showing Petitioner's mark used in connection with its bakery products.

7. Attached to this Declaration as Exhibit B is a true and complete copy of packaging showing Petitioner's mark used in connection with its bakery products.
8. Attached to this Declaration as Exhibit C is a true and complete copy of a page from Petitioner's website showing use of its RED HEN BREAD trademark.
9. Attached to this Declaration as Exhibit D is a true and complete copy of a page from Petitioner's website discussing the history of Petitioner's RED HEN BREAD trademark that has been used since 1996 in connection with Petitioner's breads, bakery products and services.

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: 4-7-2010

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

Robert Picchiatti

EXHIBIT A

Sandwiches

- 1 | Red Hen Turkey**
House roasted turkey breast, provolone, tomato, romaine, mayo, and cherry dijon mustard served on multigrain
 - 2 | Turkey on a Bollo**
House roasted turkey breast, provolone, red onion, tomato, arugula, mayo, and whole grain mustard served on a rosemary bollo
 - 3 | Chicken Pesto**
House marinated chicken breast, provolone, red onion, tomato, romaine, and basil pesto served on Italian country
 - 4 | Chicken Challah**
House marinated chicken breast, cucumber, tomato, romaine, and tarragon mayo served on challah
 - 5 | Cranberry Chicken Salad**
House marinated chicken breast, cranberries, walnuts, celery, and red onions tossed with mayo served on multigrain with tomato and romaine
 - 6 | Tuna Nicoise**
Albacore tuna, artichoke hearts, and fresh thyme tossed with olive oil and lemon served on olive rosemary
 - 7 | Spiced Roast Beef**
Roast beef, provolone, red onion, arugula and horseradish mayo served on pumpernickel
 - 8 | Red Hen Veggie**
House made hummus, green bell peppers, cucumber, red onion, tomato, and romaine served on multigrain
 - 9 | New Veggie**
Honey walnut goat cheese, roasted red peppers, green apple, and arugula served on an onion rosemary baguette
 - 10 | Knuckle**
Honey roasted ham, salami, prosciutto, provolone, red onions, tomato, romaine, and our red hen vinaigrette served on a ciabatta panino bun
 - 11 | Ham and Cheese**
Honey roasted ham, provolone, tomato, romaine, and dijon mustard served on sourdough
 - 12 | Honey Maple Ham**
Honey roasted ham, red onion, tomato, romaine, and maple cream cheese on sweet potato pecan
 - 13 | Peanut Butter and Jam**
Creamy peanut butter and strawberry jam on challah or multigrain
- Seasonal Sandwiches:**
- Winter | Turkey November**
House roasted turkey breast, provolone, red onion, tomato, arugula, and a cranberry-apple chutney served on onion sage
- Summer | Caprese**
Fresh mozzarella, basil, tomato, balsamic vinegar and olive oil on a baguette

Ask about our daily soups!

Small (12 oz)
Large (16 oz)

Red Hen



Bread

1623 N. Milwaukee

Chicago, IL 60647

phone 773.342.6823

fax 773.342.8105

M-F 7-7 | Sa 7-6 | Su 8-5

500 W. Diversey

Chicago, IL 60625

phone 773.248.6025

fax 773.248.6026

M-Sa 7-6 | Su 8-5

736 Lake St.

Oak Park, IL 60301

phone 708.383.7360

fax 708.386.4171

M-F 7-7 | Sa 7-6 | Su 8-5

Breads

Bread Loaves

Ami du Fromage
Brioche
Caraway Rye
Onion Paesano
Challah
Bittersweet Chocolate
Cinnamon Raisin Knot
Cranberry Pecan Multigrain
Cracked Wheat
Fennel Yellow Raisin
Italian Country
Roasted Garlic Ring
Milwaukee Sourdough
Multigrain
Olio Ciabatta
Olive Rosemary
Onion Sage
Pane Francese
Pumpernickel
Pumpernickel Onion
Pumpkin Sweet Corn
Raisin Challah
Velvet Ciabatta
Walnut Currant

Buns & Rolls

Baguettes, Full or Demi :
Multigrain, Onion Rosemary, Plain
Seeded, Sesame

Bagels :

Asiago, Cinnamon Raisin, Everything,
Onion, Plain, Poppyseed, Sesame,
Wheat

1.5 oz Rolls :

Ciabatta, Challah, Cracked Wheat,
Multigrain, Potato Dill, Pumpernickel
Onion, Walnut Currant

Bollos :

Cracked Wheat, Plain, Rosemary

Etc. :

Brioche, Mini Ciabatta, Tomato
Focaccia, Multigrain Twists

Pastries

Croissants

Almond, Butter, Chocolate, Chevre & Ham
Ham & Swiss, Prosciutto and Spinach
Spinach & Feta

Muffins

Bahana Date, Blueberry Lemon, Caramel
Cognac, Cranberry Almond, Cranberry
Lemon Poppy, Raisin Bran, Pumpkin Walnut

Scones

Blueberry, Chocolate Chevre, Cinnamon
Cranberry, Maple Pecan, Pumpernickel

Cookies

Chocolate Chunk, Chocolate Pecan,
Chocolate Bomb, Chocolate Chunk, Kitten
Sink, Oatmeal Raisin, Peanut Butter, Sugar

Danish

Apple, Cherry, Chevre, Raspberry

Tarts

Apple, Blueberry, Cherry

Quiche

Spinach & Feta, Sun-dried Tomato & Goat
Cheese, Olive Rosemary

Wheels

Apple, Cherry

Other Yummy Treats

Cinnamon Crisps, Coffee Cake, Brownies,
Chocolate Almond, Sesame, Whoopie Pies,
Cupcakes

Make sure we have exactly what you want
and when you want it by placing a special
order. Call us by noon the day before pick-
up at any of our locations. All special orders
must be pre-paid. Some loaves, including
organics, are subject to a 4 loaf minimum.

Coffee, Tea, & More

12, 16, and 20oz sizes

Caffe Umbria Coffee

Regular and Decaf Drip
Black Hole
Latte
Cappuccino
Mocha
Espresso
Americano

Two Leaves and a Bud Hot Teas

Ask about varieties!

More Hot Drinks

Chai Latte
Steamer
Hot Chocolate
Hot Cider (Seasonal)

Bottled Beverages

Naked Juices
Izze Sodas
San Pellegrino Water & Sodas
Bottled Water
Tropicana Orange Juice
Coke and Diet Coke

Sides

Kettle Cooked Sea Salt Chips
Bananas and Apples

Extras

Think of us when you cater your next office
event! Platters for sandwiches or pastries
and boxes of coffee are available!

Check in to see our seasonal breads and
pastries!

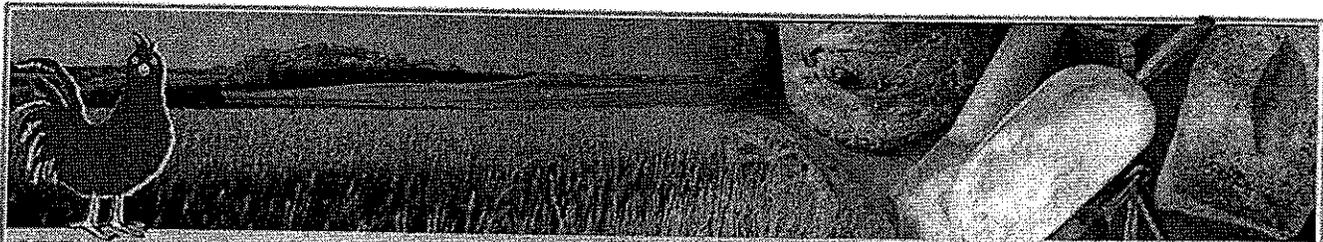
Got a special occasion coming up? Get a
Red Hen Gift Card in any amount!

EXHIBIT B

RED HEN BREAD

RED HEN BREAD

EXHIBIT C

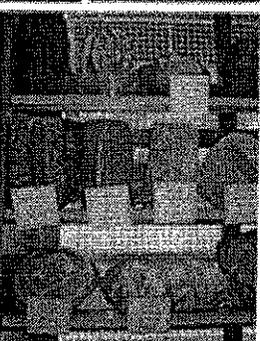
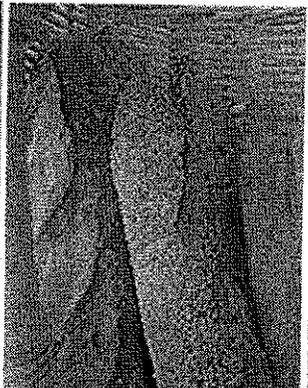


RED HEN BREAD [About Us](#) | [Our Products](#) | [Our Stores](#) | [Wholesale](#) | [History](#) | [Locate a Store](#) | [Contact Us](#)

Welcome to Red Hen Bread.

Welcome to our web site, we are pleased you have taken the time to visit us. Just in case you don't know who & what we are, the following pages should help. But feel free to call us at any time and we will be happy to answer any of your questions. Enjoy the site, but most of all try our products and we are sure you will be as impressed as we are committed.

Robert Picchetti,
President & CEO Red Hen Bread



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EXHIBIT D



About Red Hen Bread.

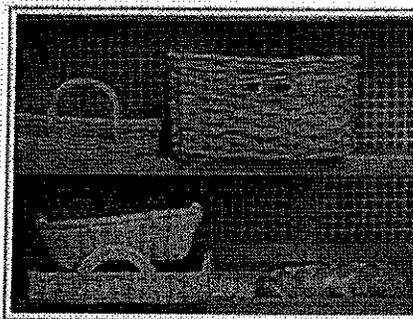


Red Hen Bread was born in 1996 with a simple philosophy, "bake great bread", the way they used to. We are as committed to our craft as the Romans were back in 168 BC when they formed the Bakers Guild, one of the oldest guilds known to man. It is also why we use only the finest ingredients we can find and produce all of our products, (350 different types of bread alone) by hand.

The necessary ingredients for making great bread can be counted on one hand... flour, water, salt, Red Hens special "starter" (and because we do not want that thumb to be lonely, we add in our secret ingredient - love). We aren't like mass producers that mix and send their doughs into machines that squeeze the life out it. We mix our doughs and give them time, time for our "starter" to grow and develop the taste and flavor that is uniquely Red Hen. We then shape by hand so we do not squeeze out the flavor we worked so hard to obtain, let it rest again and when its growth is just right we put it into a stone deck oven, give it a shot of steam - for that perfect crust, and voila' the best breads around.

Red Hen breads and pastries are natural, mouthwatering works of art. We are so proud of our products that we have two outlet stores in Chicago so that we may share them with as many people as we can.

Our first store is located at 1623 N. Milwaukee, in the Bucktown/Wicker Park area. The second, is at 500 W. Diversey in the Lincoln Park neighborhood. Our bakehouse is in a secret location known only to the bakers guild and craftsmen of Red Hen Bread.



Besides providing great products to our retail locations we also service hundreds of the best restaurants and Hotels in Chicago and surrounding neighborhoods. In fact we have sent our products as far away as California.

We are so excited to supply anyone as committed as we are in providing to their customers the best that they deserve. That is why we will continue to bake the finest breads and pastries for the wonderful people of Chicago.

Simply put "it makes us happy."

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

DECLARATION OF KATHRYN JENNISON SHULTZ
IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

I, Kathryn Jennison Shultz, hereby declare that:

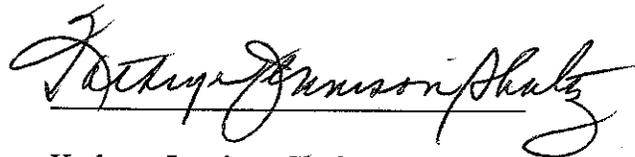
1. I am an attorney duly admitted to practice law in the Commonwealth of Virginia.
2. I submit this Declaration in support of Petitioner's Motion for Summary Judgment.
3. Attached to this Declaration as Exhibit A is a true and complete copy of the office action issued June 23, 2009, by the examining attorney, who refused registration of petitioner's applied-for mark RED HEN BREAD (Serial No. 77707868) "because of a likelihood of confusion with the mark in U.S. Registration No. 3614763."
4. Attached to this Declaration as Exhibit B is a true and complete copy of an article entitled, "White Wheat producer has found his market" by Kylene Orebaugh dated June 15, 2006, which appeared in the *High Plains/Midwest AG Journal*. In the article, Ms. Orebaugh interviews the registrant, Norm Oeding, who "has been marketing his own line of bread since September 2005 under the Little Red Hen Bakery label."

5. Attached to this Declaration as Exhibit C is a true and complete copy of an article about the Petitioner Red Hen Bread, entitled, "Friends in knead," by Pat Bruno, which appeared in *Weekend Plus, Chicago Sun-Times*, on Friday, August 22, 1997

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: April 15, 2010



Kathryn Jennison Shultz

EXHIBIT A

EXHIBIT A

Document Description: **Offe Action Outgoing**
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To: Red Hen Bread LLC (Vgrzelak@crmlaw.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77707868 - RED HEN BREAD - Red Hen Brea
Sent: 6/23/2009 4:41:01 PM
Sent As: ECOM109@USPTO.GOV
Attachments: [Attachment - 1](#)
[Attachment - 2](#)

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77707868

MARK: RED HEN BREAD

77707868

CORRESPONDENT ADDRESS:
VICTORIA GRZELAK
CONNELLY ROBERTS & MCGIVNEY
LLC
55 W MONROE ST STE 1700
CHICAGO, IL 60603-5125

RESPOND TO THIS ACTION:
<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Red Hen Bread LLC

**CORRESPONDENT'S
REFERENCE/DOCKET NO:**
Red Hen Brea
CORRESPONDENT E-MAIL ADDRESS:
Vgrzelak@crmlaw.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 6/23/2009

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62, 2.65(a); TMEP §§711, 718.03.

Section 2(d) Refusal – Likelihood of Confusion

Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S. Registration No. 3614763. Trademark Act Section 2(d), 15 U.S.C. §1052(d); see TMEP §§1207.01 *et seq.* See the enclosed registration.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). See TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. See *In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

Comparison of the Marks

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); see TMEP §1207.01(b).

The applicant's mark is RED HEN BREAD. The registered mark is LITTLE RED HEN BAKERY. The marks are likely to create the same commercial impression in the minds of consumers, as they share the common wording RED HEN.

Comparison of the Goods

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. See *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); see, e.g., *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

The applicant is providing "Bakery products, namely, bread, buns, bagels, bread rolls, baguettes, croissants, cookies, muffins, scones, danish, tarts and assorted pastries." The registrant is providing "fresh, baked bread products, namely, bread, buns, bagels, bread rolls and baguettes" The goods of both parties are closely related in that the applicant and the registrant are both providing bakery goods including bread, buns, bagels, bread rolls and baguettes.

In light of the above, because the marks are similar and the goods of both parties are closely related, registration must be refused under Section 2(d) of the Trademark Act.

Although applicant's mark has been refused registration, applicant may respond to the refusal(s) by submitting evidence and arguments in support of registration.

The applicant must respond to the following informality.

Disclaimer Required

The applicant must insert a disclaimer of BREAD in the application because it is descriptive of the type of goods that are being provided, as evidenced by the identification of goods in the application. See 15 U.S.C. §1056(a); TMEP §§1213, 1213.03(a).

The computerized printing format for the Office's *Trademark Official Gazette* requires a standardized format for a disclaimer. TMEP §1213.08(a)(i). The following is the standard format used by the Office:

No claim is made to the exclusive right to use "BREAD" apart from the mark as shown.

TMEP §1213.08(a)(i); see *In re Owatonna Tool Co.*, 231 USPQ 493 (Comm'r Pats. 1983).

A disclaimer does not physically remove the disclaimed matter from the mark, but rather is a written statement that applicant does not claim exclusive rights to the disclaimed wording and/or design separate and apart from the mark as shown in the drawing. TMEP §§1213, 1213.10.

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Amy Alfieri/
Trademark Attorney, USPTO
Law Office 109
phone: 571.272.9422
fax: 571.273.9109

RESPOND TO THIS ACTION: Applicant should file a response to this Office action online using the form at <http://www.uspto.gov/teas/eTEASpageD.htm>, waiting 48-72 hours if applicant received notification of the Office action via e-mail. For *technical* assistance with the form, please e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned examining attorney. **Do not respond to this Office action by e-mail; the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

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White Wheat producer has found his market

By Kylene Orebaugh

On Easter Sunday, Norm Oeding wasn't sure if he would even have a Wheat crop. It was ankle high, trying to head out, and in desperate need of a rain—not too promising he thought.

But, the rains finally came by the end of April and through May, and Oeding's crop is looking much better. Standing in his muddy field, Oeding was thankful for the more than an inch of rain that fell the night before. His hard white Wheat grows on close to 250 acres in Kingman County near the small town of Willowdale.

"The farm has been in the family at least since 1938. My grandfather, Herman Oeding, came to America in 1907," Oeding says. "My uncle still lives there on the homestead two miles away, and keeps it neat as a pin."

A rotation of crops

Spring Creek Ranch, raises white wheat along with some hard red winter wheat. The Wheat is Certified Organic by a third-party certifier through the U.S. Department of Agriculture. Oeding uses no chemicals on the crops.

"I felt like there were entirely too many chemicals in the environment," Oeding says. "I wanted a cleaner way of crop production and food production."

The organic certification is part of the USDA National Organic Program or NOP, Oeding said. The process involves a third-party certifier of which there are several of them in the country. Primarily, to be considered certified organic the crop has to have no chemicals for three years and have an established crop rotation program.

"It's a natural, sustainable type of agriculture," Oeding says. "I've been certified organic for six years."

Oeding plants a hard red Wheat variety, Karl 92, as well as the white Wheat variety, Heyne. The variety was named after a Kansas State University crop scientist, Oeding said, and the variety is known for its protein, milling and baking qualities. Besides the wheat, Oeding also has food grade grain sorghum and winter peas in his crop rotation plan.

"The peas leave behind a green manure (after plowing) that helps in conjunction with the nitrogen fixing," Oeding says. "That is, as long as we get rain."

The rotation of crops also helps with pest control, as there are beneficial insects, Oeding says, but farming organic is still a lot like conventional production methods.

"Organic farmers have the same concerns as conventional farmers: If it is going to rain, what the markets are doing, or if the markets will be ready when the crop is," Oeding says.

Drought is always a concern, and Oeding has dealt with drought and limited rainfall before as his family also farmed near Kanorado, Kan., (near the Kansas-Colorado border) when he was younger.

Keeping them apart

Oeding grows both red and white varieties of hard winter wheat, and this does require more work at harvest and planting. The equipment has to be thoroughly cleaned as the two types of Wheat need to be segregated.

"You have to thoroughly clean the combine, and maybe even purge it by dumping one or two bushels on the ground," Oeding says. "You have to keep it segregated."

If the Wheat happens to get mixed, the red and white, it's less valuable.

"If it has gotten contaminated, it's basically feed wheat," Oeding says. "More valuable premiums are paid for good quality certified organic white wheat. Usually it's a dollar or more per bushel for 12 percent protein."

Twelve percent and higher is what Oeding shoots for with his white wheat's protein. One crop reached as high as 14 percent, he said. As far as moisture levels go, they are a high priority as well.

"As in conventional farming, you have to keep the protein up," Oeding says. "At 10 to 11 percent moisture it also stores much better," Oeding says.

After the Wheat has been harvested, the white Wheat goes straight to the bins on the ranch.

"We aerate the Wheat (in the bins) and this helps keep the bugs in check," Oeding says.

When Oeding goes to sell his Wheat he will contact buyers and when one offers a proper bid he will ship the Wheat to them. He has a dozen Internet contacts that purchase small quantities—20 to 50 pounds—of whole Wheat and/or flour. And then there are several natural food stores, primarily in the Wichita area that market his whole grain and flour products.

"The big thing about flour is its freshness and it's whole grain," Oeding says. "The good fiber cancels out the carbs in the intestine. It's the original low carb diet."

Oeding started to sell his flour to the natural food stores after he had seen what was being offered.

"I believed I could do that too and provide a value-added product," Oeding says.

Milling and baking

The white Wheat Oeding grows is then milled on the ranch and is primarily turned into flour to bake

various bread products. Hard white Wheat has a rich, golden amber color which leads to lighter colored baked goods. It's naturally milder tasting because the bran in the white Wheat has less tannin, giving it a sweeter taste. The flour is milled from the entire Wheat berry, so it's nutritionally the same as traditional whole grain Wheat flour, with the same high levels of fiber, nutrients and minerals.

Oeding has an 8-inch stone mill with which he uses to mill the flour. It's a pretty simple process, he says.

"You put Wheat in the hopper and turn the switch," he says. "It's close to the way its been done for years."

Oeding prefers the stone mill, as a number of the newer mills use steel. The stones, he said, keep the Wheat cooler during the process, and allows the nutritional integrity of the flour to stay intact.

Much of the flour is sacked in 50 pound bags, but Oeding does package some in smaller, three pound packages. Currently he has around 200 to 300 pounds of product he sells each week. This number includes whole wheat, cracked Wheat and the flour.

His products do cost a little more than traditionally grown crops.

"It does cost more," Oeding says. "It's better quality, I think, and that quality comes from being fresh and chemical-free."

Oeding believes consumer awareness will help his products succeed, and he said many also want to know where their food comes from.

"Consumers and producers benefit alike as the dollars spent on locally produced food circulates to help build and sustain communities," Oeding says.

Some patrons find Oeding's flour by his website, www.normsflour.com or from the listing on the Kansas Wheat Commission website, www.kswheat.com. Others have found his products from word of mouth. His retail contacts came from a lot of cold calls to retailers and telling them about his quality product and negotiating a price.

Through the KWC, Oeding has received a number positive Internet inquiries.

"They've provided lots of moral support," Oeding says. "And the fact that they allowed me to post info on the web has helped. One-third to half (of sales) are Internet sales."

Kelly Dumford with the Bakery Project, Wichita, Kan., takes the flour that Oeding has milled to create breads that include the following varieties: honey whole wheat, old-fashioned cracked wheat, whole Wheat raisin, Artisan bread, burger buns, hoagie buns and dinner rolls. Oeding found Dumford's bakery through a cold call and has been marketing his own line of bread since September 2005 under the Little Red Hen Bakery label.

Oeding and Dumford also won the top bread using hard white Wheat flour in the Festival of Breads baking contest April 4. Dumford baked the winning Old-Fashion Cracked Wheat Bread using Oeding's home milled Wheat flour. Little Red Hen Bakery bread is available in several natural food stores and groceries in the Wichita and Kingman, Kan., areas.

Oeding also participates in the "From the Land of Kansas" trademark program that is administered by the Kansas Department of Commerce; in addition, the flour milling is licensed by the Kansas Department of Health and Environment and the Kansas Department of Agriculture.

Norm Oeding has found his market with his hard white wheat. The flour he mills and the bread that comes from it is sought after by bakers, and of course, those health conscious consumers who want wholesome products and food. He just hopes he can produce enough Wheat to keep his dream alive.

Kylene Orebaugh can be reached by phone at 620-227-1804 or by e-mail at kscott@hpj.com.

Date: 6/15/06

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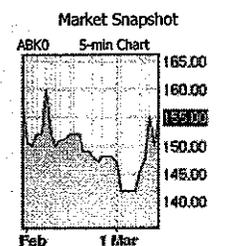


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KC Wheat	495-4	+7-2
Minn Wheat	512-4	+5-2
Oats	216-0	unch
Ethanol	1.539	-0.046
U.S. Dollar Index	80.020	-0.480
Dow Jones	131.1	unch

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DINING



With
Pat Bruno

Friends in knead

No loafing at Red Hen Bread

The bread also rises. At Red Hen Bread (1632 N. Milwaukee, 773-342-6823, bakery work is treated as an art form. In a setting that is Old World and intimate, hand-crafted loaves of bread and muffins and cookies are a symphony of shapes, sizes and colors that beg the question: Who are you? What are you? In answer, the breads sing out, "We are Potato Thyme, Pumpkin Sweet Corn, Roasted Garlic Italian Ring and Oat and Amber Honey, and we are all delicious."

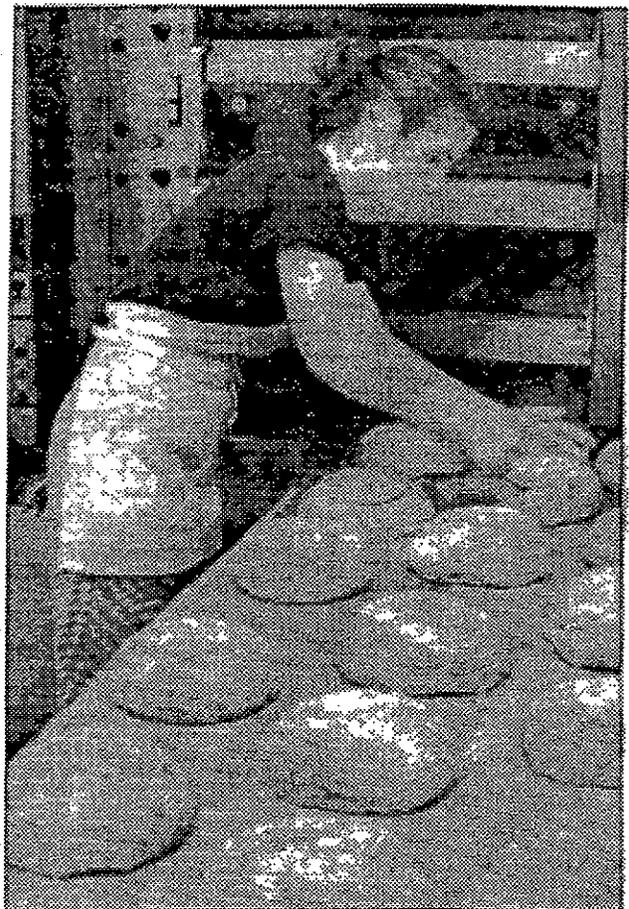
And then the muffins chime in. "We are Very Berry and Cherry Pecan and Pear Anise and Chocolate Chunk Cherry and Semolina Orange Blossom."

And then the cookies and the bars pick up the beat. The chorus is in full voice.

OK, OK, enough already, I'll take one of those and one of those and ... I'll take a bakery over a candy store any day.

Nancy Carey, head baker and founder, says that "All of our breads have distinguishing flavors, shapes, surfaces and textures. They are individually wrapped in white butcher paper and tied with red twine."

I'll say. My loaf of potato thyme bread was wrapped so nicely I considered giving it as a gift.

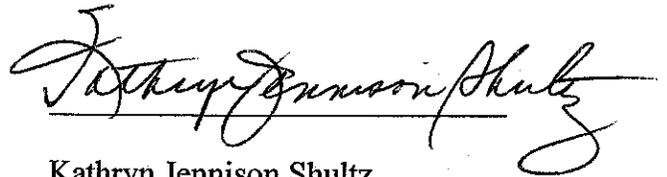


ELLEN DOMKE / SUN-TIMES

Nancy Carey of Red Hen Bakery prepares loaves of walnut wheat bread before placing them in the bakery's oven for baking.

CERTIFICATE OF SERVICE

I hereby certify that true and complete copies of the foregoing PETITIONER'S MOTION FOR AND MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT, DECLARATION OF ROBERT PICCHIETTI and DECLARATION OF KATHRYN JENNISON SHULTZ IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT were served upon Registrant by mailing same via First Class Mail, postage prepaid, to Norm Oeding, 15076 NW 180th Street, Newton, Kansas 67114, this 15th day of April, 2010.

A handwritten signature in cursive script, reading "Kathryn Jennison Shultz", written over a horizontal line.

Kathryn Jennison Shultz