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

Proceeding	91183753
Party	Defendant Diallo Yassinn Patrice
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Submission	Opposition/Response to Motion
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Date	11/18/2008
Attachments	USPTO RESPONDENT ANSWER TO MOTION 91183753.pdf (9 pages (2256174 bytes)

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

HEAVEN HILL DISTILLERIES, INC

Opposer,

Opposition No.91183753

V.

Serial No. 77/266,196

DIALLO YASSINN PATRICE,

Intl Class: 033

Respondent,

**RESPONDENT ANSWER TO MOTION FOR SUMMARY JUDGEMENT AND
MOTION TO SUSPEND**

Respondent DIALLO YASSINN PATRICE, respectfully request to the Trademark Trial and Appeal Board Office, not to accept the request of opposer's motion for summary judgment and motion to suspend, concerning the opposition No. 91183753.

As opposed to what the opposing party affirms, Respondent Diallo Yassinn Patrice doesn't want to register the HYPNOTIZER mark for liqueur, and as it is indicated on his Application form, the registration for HYPNOTIZER is filed for specifics products as : Alcoholic beverage produced from a brewed malt base with natural flavors, Alcoholic beverages of fruit, Alcoholic fruit extracts, Alcoholics malt coolers, Alcoholic punch, Cachaca, Cognac, Distilled Spirits, Fruit wine, Gin, Hard Cider, Natural Sparkling wines, Prepared alcoholic cocktail, Prepared wine cocktails, Rum, Sparkling fruit wine, Sparkling grape wine, Sparkling wine, Tequila, Vodka, Whiskey, Wine

coolers, Wines. Applicant denies the allegation of the opponent concerning the fact that the applicant Diallo Yassinn Patrice wants to register the HYPNOTIZER mark in connection with liqueur because it is absolutely false. For these reason Diallo Yassinn Patrice application to register the HYPNOTIZER mark will not cause confusion, mistake, deception, or affiliation with Heaven Hill's HPNOTIQ mark for liqueur.

Moreover, The US Trade Mark Office during office Record search for the Application HYPNOTIZER said: The Office Records have been search and no similar registered or pending mark has been found that would bar registration under Trade Mark Act section 2 (d), 15 USC 1052 (d). The opponent can't use this argument and affirm in his ground on the Priority and likelihood of confusion Trademark Act section 2(d)

That is the reason why the Applicant respectfully asks the TTAB, not to suspend this proceeding, pending the determination of Heaven Hill's Motion for summary judgment and to reject the motion of the Opponent.

The attached Memorandum in support of Respondent answer to motion for summary judgment and motion to suspend sets forth the undisputed facts and arguments in support of the Respondent answer to this motion.

Respectfully submitted

DIALLO YASSINN PATRICE

Applicant.

PROOF OF SERVICE

I hereby certify that a true and correct copy of Respondent answer to motion for summary judgment and motion to suspend was served on the following counsel for Opposer by deposit in the French Mail, in Paris France, in a sealed envelope, with first class postage fully prepaid this 17 day of November, 2008.

Matthew A. Williams

Wyatt Tarrant & Combs, LLP

500 West Jefferson Street, Suite 2800

Louisville, KY 40202

UNITED STATES

502-562-7378 Telephone

Dated: November 17, 2008

DIALLO YASSINN PATRICE.

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

HEAVEN HILL DISTILLERIES, INC

Opposer,

Opposition No.91183753

V.

Serial No. 77/266,196

DIALLO YASSINN PATRICE,

Intl Class : 033

Respondent,

**MEMORANDUM IN SUPPORT OF RESPONDENT TO OPPOSER'S MOTION
FOR SUMMARY JUDGEMENT AND MOTION TO SUSPEND**

The Respondent DIALLO YASSINN PATRICE never discusses the fact that Heaven Hill's owns all right on HPNOTIQ mark, but he doesn't agree with the fact that Heaven Hill's have a right on HYPNOTIZER trade mark.

The affirmations and the material facts of Heaven Hill in this case are in dispute. The use of HYPNOTIZER for specifics products as : Alcoholic beverage produced from a brewed malt base with natural flavors, Alcoholic beverages of fruit, Alcoholic fruit extracts, Alcoholic malt coolers, Alcoholic punch, Cachaca, Cognac, Distilled Spirits, Fruit wine, Gin, Hard Cider, Natural Sparkling wines, Prepared alcoholic cocktail,

Prepared wine cocktails, Rum, Sparkling fruit wine, Sparkling grape wine, Sparkling wine, Tequila, Vodka, Whiskey, Wine coolers, Wines will not create a likelihood of confusion on the market place. Therefore as a matter of law, the TTAB should not grant Heaven Hill's Motion for Summary judgment and accept Diallo Yassinn Patrice application to register the HYPNOTIZER mark.

STATEMENT OF FACTS

We never discuss that HPNOTIQ belongs to Heaven Hill. But Heaven Hill admit in the Opposer's response to Respondent first set of request for admissions that HYPNOTIZER doesn't belong to them (Response 5).

On September 24 2007, Heaven Hill informed the Administrator of the Examiner's failure to identify Heaven Hill's mark due to an inadequate search performed during examination. The Administrator denied this protest and allowed publication of the mark HYPNOTIZER on April 8, 2008.

ARGUMENT

The law is clear in this case and the UPSTO decided to reject the argument of Heaven Hill because they considered that the trade mark HYPNOTIZER was not confusingly similar to the previously registered HPNOTIQ mark. The facts in this case are clear; the HYPNOTIZER mark is not confusingly similar to Heaven Hill's HPNOTIQ mark because the good listed in Diallo Yassinn Patrice application are different from liqueur, which does not appear in the products listed by Yassinn Patrice application for the HYPNOTIZER mark. Therefore, the TTAB should accept Diallo Yassinn Patrice application.

Diallo Yassinn Patrice seeks registration for HYPNOTIZER mark, which is completely different in terms of products, mark, packaging, size, price (exhibit A).

Applying the law to these facts the conclusion is that the TTAB should not grant summary judgment to Heaven Hill and accept Diallo Yassinn Patrice's application.

All the decisions mentioned by Heaven Hill concerning the case cited are not cases similar to that one because HPNOTIQ is not a famous mark, see TTAB decision. And all the case cited concern famous mark.

As Heaven Hill recognize at the end on page 16 of Memorandum in Support of Opposer's Motion for Summary Judgment and Motion to suspend, « ...the different spellings and differences in phonetic pronunciation of the two marks... » . For these reasons the consumers will not be confused.

Moreover Heaven Hill recognize at the beginning of page 17: « ... there has not yet been evidence of actual confusion between goods bearing HPNOTIQ mark and those bearing HYPNOTIZER mark.. », and affirms: « ...the lack of evidence of actual confusion at this point...».

INTENT OF OPPOSER

Heaven Hill want to take from Diallo Yassinn Patrice a mark that belongs to him and his registration for many products. In fact Diallo Yassinn Patrice is awaiting the registered certificate for HYPNOTIZER soon.

SUMMARY

Heaven Hill's HPNOTIQ mark is not a famous mark and the decisions of French court are not supposed to decide for American laws/decisions, TTAB decided that The Office Records have been search and no similar registered or pending mark has been found that would bar registration under Trade Mark Act section 2 (d), 15 USC 1052 (d).

The opposer cannot use this argument and affirms in his ground on the Priority and likelihood of confusion Trademark Act section 2(d). Moreover The TTAB Administrator denied the protest of Heaven Hill's and allowed publication of the mark HYPNOTIZER on April 8, 2008.

HPNOTIQ is used for a specific product the liqueur, HYPNOTIZER is used for different products, there's no likelihood of confusion and moreover of dilution between the two Trade Marks. Diallo Yassinn Patrice's application should be registered pursuant to 15 U.S.C §§ 1052, 1063 and Heaven Hill's motion for summary judgment should be rejected.

Respectfully submitted

DIALLO YASSINN PATRICE

Applicant.

PROOF OF SERVICE

I hereby certify that a true and correct copy Memorandum in support of Respondent answer to motion for summary judgment and motion to suspend was served on the following counsel for Opposer by deposit in the French Mail, in Paris France, in a sealed envelope, with first class postage fully prepaid this 17 day of November, 2008.

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EXHIBIT A

