

ESTTA Tracking number: **ESTTA655963**

Filing date: **02/13/2015**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Heidi Peterson Barrett		
Entity	Individual	Citizenship	UNITED STATES
Address	3520 Evey Road Calistoga, CA 94515 UNITED STATES		

Attorney information	EDWARD S. WRIGHT LAW OFFICES OF EDWARD S. WRIGHT 1100 ALMA ST STE 207 MENLO PARK, CA 94025 UNITED STATES twright@claim1.com, mcerimeli@claim1.com Phone:(650) 330-0830		
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Registration Subject to Cancellation

Registration No	4384830	Registration date	08/13/2013
Registrant	Scott Curtis 7343 South Quince Court Centennial, CO 80112 UNITED STATES		

Goods/Services Subject to Cancellation

Class 033. First Use: 2013/01/01 First Use In Commerce: 2013/01/01 All goods and services in the class are cancelled, namely: Grape wine; port wines; red wine; red wines; rose wine; sparkling wines; sweet wines; table wines; white wine; wine; wines; wines and fortified wines; wines and liqueurs; wines and sparkling wines

Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Other	Mark not lawfully used in commerce and mark not used for all of the goods identified in the registration

Attachments	TL-71667-1 Petition to Cancel.pdf(67612 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/esw/
Name	EDWARD S. WRIGHT
Date	02/13/2015

Abandonment was mailed to Respondent, advising him that the application was abandoned because of his failure to file a showing or to request an extension of time.

6. On May 2, 2013, Respondent filed a Petition to Revive the abandoned application in which he stated under penalty of perjury that he had firsthand knowledge that the failure to file a Statement of Use or an extension request by the January 31, 2013 deadline was unintentional, but gave no indication or explanation as to why the showing and extension request were not filed by the deadline.

7. The Petition to Revive was accompanied by a Statement of Use in which Respondent stated under penalty of perjury that the mark was in use in commerce on or in connection with all of the goods or services listed in the application or Notice of Allowance or as subsequently modified, the mark was first used by Respondent, a related company, licensee, or predecessor in interest at least as early as January 1, 2013, the mark was first used in commerce at least as early as January 1, 2013, and it was still in use in such commerce at the time the showing was filed.

8. As a specimen showing the mark as used in commerce on or in connection with the goods, Respondent submitted a photograph of two bottles of wine with labels bearing the AVIATRIX mark, which he described as a "Picture of the bottled wine under the trade name Aviatrix."

9. The Petition to Revive was granted, and the term for filing the Showing of Use was extended to July 31, 2013.

10. On July 11, 2013, the Statement of Use was accepted, and the Registration issued on August 13, 2013.

C. Registered Mark Not Lawfully Used in Commerce

11. The distribution and sale of wine is governed by Federal law, including Title 27 of the Code of Federal Regulations ("C.F.R."), Chapter I, Part 4, Labeling and Advertising of Wine. In pertinent part, 27 C.F.R. § 4.30 provides:

(a) Application. No person engaged in business as a producer, rectifier, blender, importer, or wholesaler, directly or indirectly or through an affiliate, shall sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or receive therein, or remove from customs custody, any wine in containers unless such wine is packaged, and such packages are marked, branded, and labeled in conformity with this subpart.

and 27 C.F.R. § 4.50 provides:

(a) No person shall bottle or pack wine, other than wine bottled or packed in U.S. Customs custody, or remove such wine from the plant where bottled or packed, unless an approved certificate of label approval, TTB Form 5100.31, is issued by the appropriate TTB officer.

12. At the time Respondent claims to have first used the Aviatrrix mark in commerce (January 1, 2013) and at the time Respondent filed the Showing of Use in the application to register the AVIATRIX mark (May 2, 2013), neither Respondent nor a related company, licensee, or predecessor in interest had ever applied for or obtained a certificate of label approval (COLA) for the labels seen in the photograph of the two bottles submitted as a specimen or for any other label(s) bearing the AVIATRIX mark. In fact, Respondent still has not applied or obtained a COLA for any label bearing the AVIATRIX mark.

13. Any use by Respondent of a label bearing the AVIATRIX mark without a certificate of label approval would have been a violation of 27 C.F.R. § 4.50(a) and not a lawful use of the mark in commerce.

14. Since the AVIATRIX mark has never been used lawfully in commerce, the Registration is invalid.

D. Mark Not Used for All of the Goods Identified in the Registration

15. In Respondent's application and in the Registration, the goods are identified as grape wine, port wines, red wine, red wines, rose wine, sparkling wines, sweet wines, table wines, white wine, wine, wines, wines and fortified wines, wines and liqueurs, wines and sparkling wines.

16. On information and belief, the AVIATRIX mark was not being used in commerce on or in connection with all of the goods listed in the registration at the time the Statement of Use was filed.

17. Since the mark was not used with all of the goods listed in the Registration as required by Section 1(a) of the Trademark Act, 15 U.S.C. Code §1051(a), the Registration is invalid at least with respect to the goods with which the mark was not in use.

E. Fraud in Obtaining the Registration

18. In the Statement of Use, Respondent stated under penalty of perjury that the AVIATRIX mark was in use in commerce on or in connection with all goods or services listed in the application or Notice of Allowance or as subsequently modified.

19. On information and belief, at the time Respondent filed the Statement of Use, he knew that the AVIATRIX mark was not being used in commerce on or in connection with all of the goods listed in the application and in the Notice of Allowance.

20. The representation that Respondent was using the mark on or in connection with all of the goods or services listed in the application and Notice of Allowance was material to the registrability of the mark because such a statement is a required part of an application filed under, or converted to, 35 U.S.C. §1051(a), and the registration would not have issued without it.

21. On information and belief, Respondent has always had full knowledge of and control over any wines produced and/or sold by him and any products for which the registered mark has been used, and Respondent was fully aware of the falsity of the representation that the mark was being used in commerce on or in connection with all of the goods listed in the application and Notice of Allowance.

22. On information and belief, the false representation that the mark was being used on or in connection with all of the goods listed in the application and Notice of Allowance was made with the intent to deceive the PTO and cause the PTO to believe the mark was being used on all of those goods so that it would issue a registration to Respondent in which those goods were covered. But for the false representation, the registration would not have issued.

23. Because the Registration was obtained by fraud, it is invalid and should be cancelled in its entirety.

WHEREFORE, Petitioner prays that Registration No. 4,384,830 be cancelled in its entirety.

Respectfully submitted,

s /Edward S. Wright/
Edward S. Wright, Reg. No. 24,903
Attorney for Applicant

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PROOF OF SERVICE

I, Edward S. Wright, a citizen of the United States, over the age of eighteen years, whose business address is 1100 Alma Street, Suite 207, Menlo Park, California, declare under penalty of perjury that the foregoing PETITION TO CANCEL is being served on Respondent by depositing a copy thereof with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed as follows:

Scott Curtis
7343 South Quince Court
Centennial, CO 80112

on February 13, 2015.

s /Edward S. Wright/
Edward S. Wright