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Filing date: **06/17/2013**

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

Proceeding	85129206
Applicant	Stacked Wines LLC
Applied for Mark	STACKED
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Submission	Reply Brief
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Signature	/Kathleen G. Mellon/
Date	06/17/2013

Our Reference: STAC-100-TM

TRADEMARK

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

Applicant:	Stacked Wines LLC
Serial Number:	85/129,206
Filing Date:	September 14, 2010
International Class Number:	033
Examining Attorney/Law Office:	Scott K. Bibb/109
Mark:	STACKED, and design

APPLICANT'S RESPONSE TO EXAMINING ATTORNEY'S APPEAL BRIEF

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Sir:

The Applicant has reviewed the Examiner's Appeal Brief and respectfully submits the Examiner has not correctly analyzed this situation now before the Board.

It is the Examiner's position that STACKED needs to be disclaimed as it is a descriptive feature of the Applicant's goods (wine) and that this "feature" is the current manner of packaging.

The Applicant's position is that the goods are wine and the packaging is not a feature of the goods. If a disclaimer is required, it must be for the reason that the term describes an ingredient (grapes), quality (mellow), characteristic (bubbly), feature/function (libation) or use of the goods. The manner of packaging or marketing the goods is not such a factor.

I. The wording STACKED is not merely descriptive of wine.

The Applicant's wine is currently packaged in vertically arranged wine glasses and wrapped resembling a bottle of wine.

Throughout his brief, the Examiner repeatedly states that the term "stacked" is merely descriptive of the packaging for the Applicant's goods, setting forth dictionary definitions of stacked and articles regarding Applicant's product and packaging. The Examiner cites cases describing "merely descriptive" standards. These state a mark may be merely descriptive if it describes one significant function, attribute or property of the goods (wine). STACKED does not describe a characteristic, or function or property of wine. Therefore, in this instance, it should not have to be disclaimed.

The articles from the Internet do not further illustrate the descriptive nature of STACKED as a feature for wine as the Examiner asserts on page 7 of his brief. The articles do discuss the packaging of the Applicant but this packaging is clearly separate from the wine. This unique packaging is another aspect of the Applicant's business. The patent pending container is called VINOWARE and will be marketed and sold to others for their wines/beverages. The articles refer to the packaging as a "four pack stack" or "stacks of four" or "four glasses of this wine are stacked together and snap apart" or "portion pack sized wine glasses" or includes four stacked glasses full of wine" or "the stacked wines tower." With respect to the last example, the Applicant's business name is Stacked Wines, LLC. The articles also discuss the fact that the containers are called VINOWARE. Further, the referenced articles discuss the wine and the efforts being made by the Applicant to surpass other wines that sell for the same price point. As the Applicant pointed out to the Examiner in the response to the May 4, 2012 Office Action and

also in its Appeal Brief, one of the founders worked at a Napa Valley Winery and the cited articles are positive about the quality of wine sold under the STACKED mark (see attached articles A and B).

The Applicant is not attempting to inhibit any competition in the marketplace and has represented all along that business and competitors are free to use the descriptive term “stack” or “stacked” to describe their packaging or glasses, however, these parties should not be able to use STACKED for wine. This does not inhibit any competition. The Applicant’s STACKED mark is for wine. The Examiner states packaging and goods are the same, however, Applicant disagrees. These goods do not need to be packaged in vertically arranged glasses. The goods are wine and the packaging is not an integral part of the goods.

II. The mark STACKED is not a feature of goods.

The Examiner states that determining the descriptiveness of a mark is done in the context in which the mark is being used citing *In re The Chamber of Commerce of the US*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir 2007)); TMEP §1209.01(b).

These cases do not support the proposition that STACKED is descriptive of wine. The mark in *In re The Chamber of Commerce of the US* supra was NATIONAL CHAMBER and was used in connection with services promoting interests of business men and women throughout the United States, a common purpose of the Chamber of Commerce. Also, the term CHAMBER was known as a common term for Chamber of Commerce. *In re Bayer Aktiengesellschaft* supra involved the mark, ASPIRINA, for analgesic medication (aspirin). There was evidence the purchasing public associated ASPIRINA with aspirin and NATIONAL

CHAMBER with NATIONAL CHAMBER OF COMMERCE. The Examiner presented no evidence of the public viewing the Applicant's packaging as STACKED (the term) and even if it did, this Applicant submits this should not affect the fact that the Applicant's STACKED mark is for wines/sparkling wines.

The Examiner has shown no examples of the Trademark Office requiring disclaimer of packaging and the Applicant has repeatedly asked for this. The only case Applicant found which closely resembled this situation was U.S. Registration No. 3,986,990 for SUPER STACKER and the Examiner dismissed this with the language that just because a third party registration was issued without a disclaimer is of no consequence. The Examiner then goes on to attempt to equate Applicant's wine packaging to the cases involving shape or form of products finding SOLDER STRAP merely descriptive of heaters in form of bands or straps (In re Metcal Inc., 14USPQ2d 1334 (TTAB 1986), and TOOBS for fixtures in the shape of tubes (In re H.U.D.D. L.E., 216 USPQ 358 (TTAB 1983)). The Examiner states determining descriptiveness of a mark is done in relation to the goods. The goods are wines/sparkling wines – not a container for wines or tower of glasses. The wine may be packaged now in a tower of glasses but the goods are the wine, not the container, and the wine may be packaged in a bottle, bag or box in the future.

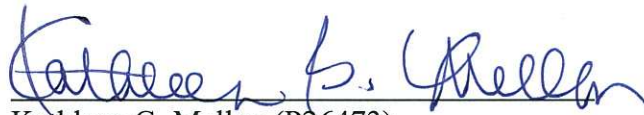
III. The disclaimer requirement is prejudicial to the Applicant.

Requiring a disclaimer will be prejudicial to the Applicant and is not warranted. The Examiner states in his brief as a response that the Applicant provided the specimens so the disclaimer should be required. The Applicant is not certain how that negates the unnecessary and prejudicial consequences of the disclaimer. The Applicant submitted the label of the mark on the goods in the current manner of use. Because the goods are wines and STACKED is not a

descriptive term for wine, the Applicant does not believe it should be required to enter a disclaimer. STACKED may be a descriptive term of the current packaging of the Applicant, however, STACKED is not a descriptive term for the goods (wine/sparkling wine). If disclaimed, it will allow others to use this mark for wines. Others may use this term to describe their packaging but should not be able to use this mark for wines.

Because the term "stacked" is not an ingredient, function or characteristic of wine, no disclaimer should be required. Such a disclaimer will severely prejudice the Applicant. Therefore, the Applicant respectfully requests the Board allow Applicant's mark to be registered without this disclaimer. Should the Board determine a disclaimer is required, the Applicant requests the Board enter the disclaimer.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kathleen G. Mellon", is written over a horizontal line.

Kathleen G. Mellon (P26473)
Attorney and Authorized Agent for Applicant

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CONOR FRIEDERSDORF - Conor Friedersdorf is a staff writer at *The Atlantic*, where he focuses on politics and national affairs. He lives in Venice, California, and is the founding editor of *The Best of Journalism*, a newsletter devoted to exceptional nonfiction.

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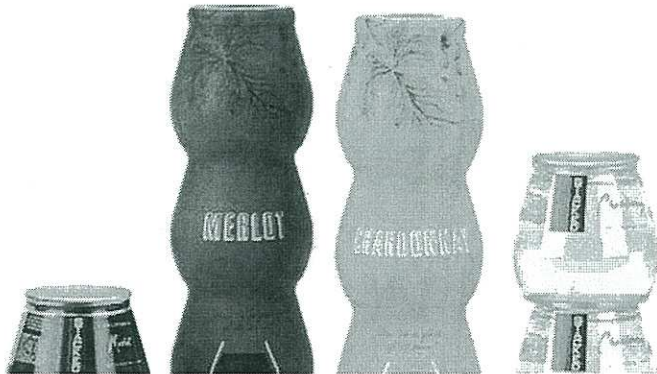
A New Way to Drink Wine: Trading in the Bottle for the Four-Pack Stack

APR 6 2012, 11:50 AM ET 6

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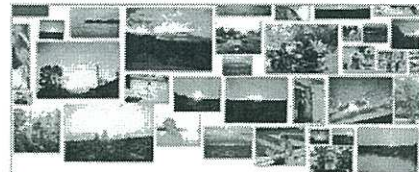


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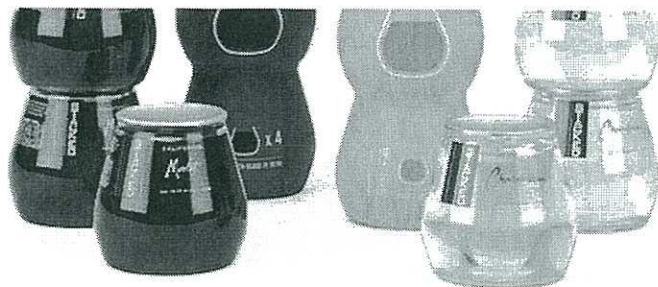


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Stacked Wines

Musing on a favorite pastime, James Michener once declared that "to dine in harmony with nature is one of the gentlest and loveliest things we can do," concluding that "picnics are the apex of sensible living." It's a mantra I've taken to heart, "for of this world one never sees enough." My habit is to bring a bottle of wine, uncivilized prohibitions against imbibing it outdoors be damned. Usually I take a wine key too, but being a forgetful sort, I've had occasion to force corks down the necks of bottles with objects as varied as a cheap plastic pen, splintery driftwood, a friend's lipstick container, and the curved metal protruding from a u-lock.

This lifestyle hassle puts me squarely in the target demographic of Stacked Wines, a new company that's offering a variation on the traditional wine bottle and betting that their container is going to be competitive with or surpass in popularity the box-enclosed plastic bladder, the Tetra Pak, the Wine Cube, and the PET bottle.

"A hundred years ago, beer was sold in bulk containers and poured into glasses to drink," says Matt Zimmer, who founded the company with two classmates from UC Irvine's business school. That's still the case, he notes (what better way to drink beer than on draft), but bottles and cans came along, made the product more portable, and are now preferred in many situations. "The stigma against alternative containers for wine is already fading. I don't think the one I've designed is going to win out over a traditional bottle if you're out to dinner at a fancy restaurant," he says. "But on a hike, or a picnic, or the deck of a boat? Sometimes you don't want to mess around with a corkscrew and stemware."

Vinoware is the name Stacked Wines has given to its patent-pending container. Its meant to resemble a stemless wine glass. Made of recyclable plastic, it has a shelf life of 12 to 14 months, comes stacked four to a package, and is impossible to stop playing with when someone hands you a stack because the four individually sealed servings snap apart and back together again. If you waited for your fiancé to go on an afternoon run, took them onto the back deck, and threw them high in the air like a baton twirler, successfully catching them three times but fumbling on the inevitable 180-degree-turn-and-behind-the-back-hand-grab-attempt, they'd crash to the ground without breaking apart or shattering or spilling on the wood surface. And the individual seals mean



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that if you've got half your wine left there's no need to hunt around for the cork, only to remember that its structural integrity didn't survive your clumsy attempt at removing it*.

Then again, four equally apportioned 187 milliliter containers prevent you from slyly pouring slightly less than a full glass of wine for friends prone to debauchery, or slightly more for a significant other just before you propose. Or splitting up the wine equally among three or five people without recalling least common multiples. A group of seven would need four shrink-wrapped units of Stacked Wine, separable into 28 single serving containers, if they were strict egalitarians. Also, some people just like bottles. Or boxed wine, for that matter. Every time I've seen a consumer encounter Stacked Wine for the first time the novelty factor is enough that they're at least tempted to try it. How many will conclude it's a container they'd want to drink from regularly?

The answer depends at least partly on how well the company's two other founders do their jobs. Doug Allan, who worked at a Napa Valley winery before business school, is the man in charge of putting the right wine inside the company's unique packaging. So far Stacked Wines offers a signature Merlot and Chardonnay. It's adding a Pinot Grigio in time for summer and a Cabernet Sauvignon by fall. The price for all varietals is \$14.99, a figure that reflects a tension in the business: on one hand, the company wants to avoid doing to Vinoware what Franzia did to boxed wine - in a market where anything that isn't in a traditional bottle is still viewed with suspicion, the future of their drinking vessel depends partly on establishing it in the minds of consumers as something that contains quality wine. At the same time, young people are more willing than older cohorts to try alternatives to bottles. Pricing them out of the market would be self-defeating.

In the short term, Stacked Wines has settled on trying to surpass in quality other wines that sell for the same price. The long term question looming over the enterprise: to what extent are they a wine company versus a container company? "There's definitely an opportunity with the package to put in wine of varying quality," says Allan. "One day, we might have wine in our containers on the shelves at Trader Joe's, competing in price with their bargain offerings, and at the same time be partnering with a winery to put an \$18.99 bottle on the shelf at Whole Foods."

The dream scenario: a future wherein the wine aisle at the grocery store has a Stacked Wines section that includes wine from all sorts of vintners, in much the same way that the coffee company Keurig offers in its single serving containers a signature brand, Green Mountain Coffee, but also sells ground coffee beans from brands as varied as Starbucks, Newman's Own and Folgers.

Jodi Wynn, the third founder, is charged with marketing the company, and insists that although Stacked Wines aspires to offer the favorite product of people drinking wine from anything other than a bottle, they don't see themselves in a zero sum competition with other alternative containers. "I recently visited a boutique wine shop in Los Angeles that was offering a bunch of different tastings, and one of the options was a flight made up entirely of boxed wines, which got me so excited," she said. "Anytime other players in the industry put good wine in an alternative package, that helps us. And we see ourselves competing very broadly. Our product allows you to enjoy wine in places where it would otherwise be inconvenient. In that sense we're competing for consumers who've previously opted for beer in certain situations but prefer wine."

Forced to bet on whether Stacked Wines can succeed in the consumer market, I'd need to think long



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and hard. Musing on the hassles I've undertaken to open wine bottles without a corkscrew, I think that I enjoyed the need for enterprise, the grateful picnic companions, and even the wine stains that tend to sully one's shirt when the cork, forced down into the bottle, displaces juice that squirts out of the neck. There is also the longstanding fact that my alternative container of choice is the wineskin. I imagine partaking from one as Ernest Hemingway instructed in *The Sun Also Rises*: arm extended straight, head tilted back, a stream of wine shooting through the air into one's mouth before the *bota* is shared. Put another way, I am not a representative consumer. I am nevertheless enamored of the notion that a guy with a notepad can still take a ubiquitous product and invent a tweak that could change everything. It's impossible to meet a guy like that and want anything but to raise your Vinoware and toast.

One last advantage the container has, compared to other alternative wine vessels, is how seamlessly it fits into the established distribution system: Stacked Wines come packaged in cases identical to the ones that hold wine bottles (save their lighter weight), and the shape of the stack permits them to sit on store shelves beside other wines - and to replace them in various other venues too. Even as the company sells to retailers and direct to Californians on its Web site, it's easy to imagine an alternative strategy: an attempt to sell the Stacked Wine concept to an airline and a baseball stadium and a Las Vegas resort that doesn't permit glass beside the pool. Vinoware is a plausible offering in any venue for which precisely controlled portions and lightweight plastic containers are useful. The founders of Stacked Wines think the surest path to such clients is succeeding among consumers, and taking that proof to airlines and hotels and more. Are there enough wine consumers who picnic, boat, hike and camp for their plan to work? That's one of the most pertinent questions their potential investors will ask themselves.

Headquartered in Newport Beach, California, Stacked Wines has just done a run of 1,000 cases that are mostly available in Orange and Los Angeles counties (or statewide on its Web site). It plans to be in stores throughout California later this year, and to brave the needlessly complicated regulatory environment imposed on interstate wine sellers in 2013. After that, assuming good sales, they'll take their product nationwide so long as they've found willing investors. They'd perhaps benefit from a fourth equity partner too, if only for product sampling sessions.

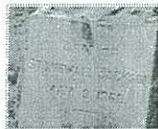
*Neither napkins nor aluminum foil nor the pacifier of a friend's baby reliably seals a bottleneck with sufficient airtightness to prevent oxidation.

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Reasons to purchase:

- New Product - Take wine anywhere! No wine opener or glass required!
 - "Vinoware" is a safe plastic designed for wine storage - this package stays fresh for 1 year*
 - Wine Quality is solid - Varietally correct California Chardonnay or California Merlot available now - more will come on line later!
 - Perfect for patio parties, picnics, airplanes, hikes, boats, day trips and remote events where taking glasses isn't possible.
 - I predict that this product will sell out quickly and that you will want to secure as many of these as you can for summer.
- *This product has been tested and is approved and endorsed by Top Blackberry, Founder, Vinoware Division

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BACKSTORY

Stacked Wines Partner, Douglas Allan not only worked at Chateau Montelena, he was an employee of LearnAboutWine! Douglas Allan and I did some remarkable things together but nothing will compare to this venture - I'm only glad I get to help launch this exciting concept.

Douglas wisely got ahold of me but he knew that if I didn't love the product, I wouldn't endorse it... This product far exceeds other inadequate steps... this product is a huge step into the future.

LearnAboutWine seeks to introduce (and continue to introduce) NEW IDEAS... We want to help break down barriers, excite audiences, and educate ... all good things for wine!

It's so important that LearnAboutWine remain on the cutting edge... and not just follow along... we want to be your trusted source and we can only do that if we do the homework and the legwork too! We are truly dedicated to taking wine into the future... and this package design is a great step in the right direction!

Join me and try this product out - I think you will be so glad you did!
PURCHASE NOW and SHOW YOUR FRIENDS - they will be blown away by this idea.

About the wines:

Stacked Wines California Merlot has been hand selected to offer a hassle-free, accessible wine with just enough complexity sprinkled in to make it interesting. Stacked's Merlot exhibits tasty fruit flavors like red plum, red raspberry and cherry. Not to be overshadowed by the beautiful fruit, the Merlot has a light toasted oak that brings a soft cedar and tobacco note that adds a surprising layer of sophistication. It has a mellow tannic structure and medium body that provides just enough power to grip the senses balanced with enough restraint to make it very easy to drink. Merlot has a reputation for being non-descript...this Merlot breaks that mold by providing loads of fruit and layers of flavor.

Stacked Wines California Chardonnay has been hand selected to reflect our vibrant and easy going nature. Stacked's Chardonnay is refreshing and clean with bright ripe citrus like Meyer lemon and Key lime. With tropical fruits like ripe kiwi and green mango, this Chardonnay is going to excite the taste buds. It showcases the bright fruit and is balanced with a light touch of oak and a soft creamy mouth feel. Flavorful without being overpowering, our Chardonnay is easily enjoyed on its own or with any traditional food pairing. Chardonnay has a reputation for being too oaky and too buttery...this Chardonnay definitely does not perpetuate that reputation because it has such terrific bright fruit.

About STACKED wine:

1. Premium Vintage Quality Wine

Top quality wine has never been so easy! STACKED's wine program was developed by our in-house sommelier to match the places in which STACKED is intended to be enjoyed: outdoors and on the go! The vintage quality wines are refreshing, fruit forward, and reflect the true flavor profiles for each varietal.