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

Proceeding	91190642
Party	Plaintiff Constellation Wines U.S., Inc.
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Attachments	Reply in Support of Opposer's Motion for Summary Judgment.pdf (5 pages) (215951 bytes)

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

CONSTELLATION WINES U.S. INC.
Opposer,

v.

ASV WINES, INC.
Applicant.

Opposition No. 91190642

Mark: PAINTED HORSE & Design

Serial No. 77/630,676

REPLY IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Opposer, Constellation Wines U.S., Inc. ("Opposer"), respectfully moves the Board for leave to file a reply brief in support of its motion for summary judgment pursuant to Fed. R. Civ. P. 56.

Opposer is moving for summary judgment, denying registration of Applicant's trademark application Serial No. 77/630,676 for the mark PAINTED HORSE & Design based on priority and likelihood of confusion. Applicant responded and Opposer replies herein.

I. Opposer's Motion for Summary Judgment was timely

Applicant claims that Opposer's Motion for Summary Judgment was brought prematurely. According to 37 CFR 2.127(e)(1), a motion for summary judgment must be made by a party after its initial disclosures are made and before commencement of the first testimony period. Whether depositions were taken or discovery answered is immaterial. As such, Opposer's motion is timely.

II. Applicant's Response misstates the premise on which Opposer's Summary Judgment Motion is based.

Opposer specifically stated that the design portion of Applicant's PAINTED HORSE & Design mark and Opposer's WILD HORSE mark are legal equivalents. Applicant, however, begins its argument to the contrary by comparing the marks in their entireties and stating that, "they are different word marks that are not equivalent." (see Applicant's Memorandum in Opposition to Opposer's Motion for Summary Judgment, page 2, 4th paragraph) Applicant further attempts to obfuscate the matter by making the argument that the word portions of the marks, ie. PAINTED HORSE and WILD HORSE, are not legal equivalents and that PAINTED HORSE & HORSE Design and WILD HORSE & HORSE Design are not literal equivalents. (See Applicant's Memorandum in Opposition to Opposer's Motion for Summary Judgment, page 4, paragraph A5.) Opposer wishes to point out that neither of these two arguments were put forth by Opposer in its summary judgment motion.

III. Applicant's claim that its horse design is not a wild horse is not convincing or valid

Contrary to Applicant's claim, simply putting its design together with the words PAINTED HORSE does not make it not wild. Applicant continues to misleadingly refer to its mark as the "PAINTED HORSE & CAVE Design" mark. Since there is no "cave" aspect of either the design or wording in Applicant's mark, Opposer fails to see how they can keep mistakenly referring to it as such. There is no mention of caves or Lascaux in Applicant's description of the mark on the record. However, if Applicant persists in its description of its

mark as a "CAVE Design" Opposer would like to point out that it is common knowledge that only wild things are associated with caves.

In "Disputed Material Fact No. 2" Applicant claims that its design mark is not "a running, bucking horse of no particular breed that is unrestrained and unbridled." However, a simple visual inspection of the design portion of Applicant's mark reveals that, 1. the horse pictured is running and bucking, 2. there are no distinctive markings to identify a particular breed, 3. there are no restraints on the horse, and 4. there is no bridle on the horse. These facts are undeniable and apparent to anyone.

Applicant claims that its mark is an "artistic rendition of the Lascaux Cave's Paleolithic paintings which consisted of prehistoric stags, bison, cattle and bulls" and that "the commercial impression created is not of a 'wild' horse, but a 'prehistoric' horse." (See Applicant's Memorandum in Opposition to Opposer's Motion for Summary Judgment, page 3, paragraph A2.) Both of these statements contain contradictions. First, Applicant claims its horse design mark is an artistic rendition of the Lascaux Paleolithic paintings none of which, by its own admission, contained a horse. Stags, bison, cattle and bulls perhaps, but not a horse. Second, Applicant claims the commercial impression is that of a prehistoric horse, not a wild horse. However, by its very definition, "prehistoric" implies "wild" as there were likely few horse trainers around before recorded history.

The consuming public is generally not privy to how a mark is conceived. Therefore, the inspiration or design concept should have no bearing on the commercial impression as experienced by the consumer. As Opposer has demonstrated, the word "wild" has a particular, well-known connotation and Applicant's horse design fits that connotation. Therefore, the average purchaser of wine encountering Applicant's horse design on the same type of goods

(wine) and in the same channels of trade (wherever alcoholic beverages are sold) as Opposer's WILD HORSE mark, is likely to be confused.

Finally, Applicant makes a completely unintelligible argument concerning some faulty underlying assumption that Opposer has made, but which it declines to identify. (See Applicant's Memorandum in Opposition to Opposer's Motion for Summary Judgment, page 3, paragraph A4) As for Opposer's duPont factor arguments, it cannot be disputed that the parties' goods are both "wines." Furthermore, as there are no restrictions on the channels of trade in either Opposer's registration or Applicant's application, those trade channels and the potential customers are considered legally identical. Of this there can be no dispute.

CONCLUSION

Contrary to what Applicant claims in its response to Opposer's Motion for Summary Judgment, no genuine issues of material fact exist with regard to the following: 1) the design portion of Applicant's PAINTED HORSE & Design mark and Opposer's WILD HORSE mark are legal equivalents; 2) The parties respective goods, channels of trade and potential customers are identical; 3) Opposer has priority over Applicant for use of its mark long prior to any date of first use claimed by Applicant; 5) There is a likelihood of confusion between the marks of the parties based on the fact that the design portion of Applicant's mark is the legal equivalent of Opposer's mark, the goods are identical, and the goods are sold in the same channels of trade to the same potential customers.

In light of the above, Opposer respectfully requests that its Motion for Summary Judgment be granted and U.S. Appl. Serial No. 77/630,676 for the mark PAINTED HORSE & Design not be allowed to register.

Dated: March 5, 2010

BAKER AND RANNELLS, PA

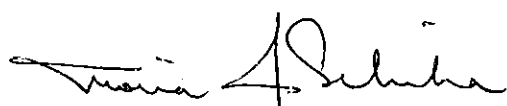
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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Reply in Support of Opposer's Motion for Summary Judgment in re Opposition No. 91190642 was forwarded by First Class, postage pre-paid mail by depositing the same with the U.S. Postal Service on this 5th day of March, 2010 to the attorneys for the Applicant at the following address:

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