

ESTTA Tracking number: **ESTTA747820**

Filing date: **05/20/2016**

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

Proceeding	91225185
Party	Plaintiff NouvEau Inc.
Correspondence Address	THOMAS O PEYTON NOUVEAU INC 324 FERRY STREET SUITE 204, PO BOX 1685 LAFAYETTE, IN 47902-1685 UNITED STATES tpeyton@nouv-eau.com
Submission	Other Motions/Papers
Filer's Name	Thomas O Peyton
Filer's e-mail	tpeyton@nouv-eau.com, peyton.tom@gmail.com
Signature	/Thomas O. Peyton/
Date	05/20/2016
Attachments	Amend. Not. of Opp. VINEAU mark Proc. no. 91225185 (2).pdf(1528968 bytes)

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

In the matter of trademark application Serial No. 86643989
For the mark VINEAU
Published in the Official Gazette on October 20, 2015

NouvEau Inc.

v.

Don Sebastiani & Sons International Negotiants CORPORATION CALIFORNIA

AMENDED NOTICE OF OPPOSITION

Proceeding no. 91225185

OPPOSER: NouvEau Inc., INDIANA CORPORATION, PO Box 1685 Lafayette, IN 47902

The above identified Opposer, NouvEau Inc. (“NouvEau”), will be damaged by registration of the VINEAU mark shown in the above-identified application and hereby opposes Applicant’s VINEAU mark in International Class 032 non-alcoholic beverages, flavored waters and water beverages for four primary reasons: a) because VINEAU has the same meaning as Eau de Vin, water of wine or wine water, that is the statement of identity for Opposer’s unique product under its composition of matter patent made generic by Nouveau’s invention, b) because Opposer has prior use of the statement of identity using water from wine to describe its unique product under various brand names including Eau de Vin and Aqua Vin Naturelle meaning water of wine and natural water of wine, c) because under the Lanham Act 2(d), Applicant’s proposed mark is confusingly similar if not identical to Opposer’s equivalent marks in prior use, and d) because Applicant is attempting to do by trademark what it cannot do by patent. Therefore, VINEAU should not be allowed registration as a US trademark.

In support of its opposition, Opposer states:

1) VINEAU is clearly recognized in the French language as “wine water” and French trademarks have existed for Eau De Vin defined as “water wine” (Exhibit 1) since 2005 (Exhibit 2) and “wine water” (Exhibit 3). Such marks are presently included in the license of Opposer’s French patent and other intellectual property to a French company. See Statement 3 below.

2) NouvEau clearly owns with 2004 priority rights US Patent 7569146-Claim 20 (Exhibit 4), a unique composition of matter product by process patent, that filters the liquids remaining after distillation of alcohol from fermented sugar (fruit) and starch (grain) feedstock to make a unique patented potable water product. Said sugar includes grapes fermented to make wine whereby the wine alcohol from its sugars is distilled off the top, to make wine alcohol, leaving on the bottom the water of

wine that NouvEau filters to make its potable water of wine product, hence wine water, a unique singular product made generic by virtue of Opposer's product patent. See 37 CFR 2113: Product-By-Process Claims.

[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. 37CFR 2113: Product-By-Process Claims.

3) NouvEau also owns French Patent 1748835 with the same methods as US Patent 7569146 to make a unique potable wine water which patent has been in practice in France by NouvEau since 2008 and 2009 and marked as French wine water or water from wine (Exhibit 5) and with brand name "Eau de Vin" as US Trademark serial no. 86810563 and as sold on November 4, 2015 (Exhibit 6).

4) Since 2007, Opposer has been engaged in research and commercial development of its patented manufactured product referred to as Eau de Vin in both France and the United States (Exhibit 7, 8) and has published its inventions and statement of identity to make wine water and water from wine on its web site (www.nouv-eau.com) and by reference to its American and French patents in the public domain.. This water from wine product was sold in commerce as early as 2008, and prototype bottles labeled with the statement of identity "water from wine" as the basis for registered trademark 77076194 Aqua Vin Naturale (natural water of wine) entered into interstate commerce in 2009 with label (Exhibit 5 and 9).

5) Applicant's proposed VINEAU (wine water) mark is an imitation and willful attempt to appropriate by trademark Opposer's patented water of wine product and is substantially if not identical in name, leading to a false and misleading statement made by Applicant in commerce causing harm to the Opposer and violating the Lanham Act (counterfeiting)¹ with a likelihood of confusion under the Lanham Act 2 (d). In *Kellogg Co. v National Biscuit Co.* (305 U.S. 111, 59 S. Ct. 109, 83 L. Ed. 73 (1938)), it is clear a product name made generic by a patent is carried with the patented product that manufactures it until off-patent when it comes into the public domain. The Supreme Court noted (note 11 (305 U.S. 111, 59 S. Ct. 109, 83 L. Ed. 73 (1938))) "... from the cessation of the monopoly and the falling of the

¹ Under the "Stop Counterfeiting in Manufactured Goods Act," PL 109-181 (2006), the US Department of Justice investigates and prosecutes the counterfeiting of intellectual property and goods (18 USC 2320).

patented device into the domain of things public that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly.”

6) A trademark cannot serve as a substitute for a patent. In *A.J. Canfield Co. v. Honickman*, 808 F. 2d 291 (3rd Cir. 1986)), the court notes the nexus between trademark law and patent protection:

The genericness doctrine prevents trademarks from serving as the substitutes for patents, and protects the **public right to copy any non-patented, functional characteristic of a competitor's product**. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230, 84 S.Ct. 784, 788, 11 L.Ed.2d 661 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964). Trademark law seeks to provide a producer neither with a monopoly over a functional characteristic it has originated nor with a monopoly over a particularly effective marketing phrase. Instead the law grants a monopoly over a phrase only if and to the extent it is necessary to enable consumers to distinguish one producer's goods from others and even then only if the grant of such a monopoly will not substantially disadvantage competitors by preventing them from describing the nature of their goods. See *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 84 (3d Cir.1982) (trademark law remedies must "avoid affording undeserved patent protection"). Accordingly, if a term is **necessary to describe a product characteristic that a competitor has a right to copy**, a producer may not effectively preempt competition by claiming that term as its own. *Ibid.* at paragraph 55.


7) Opposer has a US government granted patented product monopoly with a functional characteristic (wine water) and Applicant does not have a “right to copy” Opposer’s unique patented product by using a confusingly similar generic trademark without license from NouvEau. Applicant’s mark is generic by itself to simply describe wine flavored water (wine water), which is a combination of a flavor and a non-descript water source to make a mixture of two or more ingredients and not a singular unique product. Applicant has no right to copy Opposer’s unique singular product made by patent which, in effect, constitutes a patent infringement of Opposer’s unique patented product by trademark.

8) It is unnecessary for Applicant to use WineWater to brand or describe its product. Applicant can select from any trademark name suggestively related to wine, such as “Meritage Water,” to describe its mixed ingredient wine and water beverage, rather than the generic “wine water”.

9) VINEAU is confusingly similar to Opposer’s unique singular patented product, brand and statement of identity and the public will be misled if Applicant’s mark is approved to the detriment of NouvEau’s manufactured product.

Wherefore, NouvEau respectfully requests the Board to review Applicant’s application to register VINEAU as a U.S. trademark in light of Opposer’s evidence herein set forth and find that

Applicant's mark is confusingly similar if not identical to Eau de Vin, that VINEAU has the same meaning as Eau de Vin, that Opposer has established prior use of its unique patented product's statement of identity, and that Applicant has attempted to preempt Opposer's patent by registering the mark VINEAU in violation of the Lanham Act. Applicant's registration of the VINEAU mark should be denied without any further proceedings.

By 
Thomas O. Peyton, President
NouvEau Inc.

Date May 20, 2016

CERTIFICATE OF SERVICE
TTAB/ Opposition No. 91225185

I hereby certify that a true and complete copy of **Amended Notice to Opposition** has been served on Warren Dranit, Attorney for Applicant, Don Sebastiani & Sons International Wine Negotiants, by transmitting such copy filed electronically with the Trademark Trial and Appeals Board on May 20, 2016 by email and by certified mail to:

Warren L. Dranit
Spaulding, McCulloch & Transil LLP
90 South E Street, Suite 200
Santa Rosa, CA 95402
dranit@smlaw.com

to electronic filing:
Trademark Trial and Appeal Board
PO Box 1451
Alexandria, VA 22313-1451

NouvEau Inc.

By : 

Thomas O. Peyton, PhD
President & CEO
NouvEau Inc.
PO Box 1685
Lafayette, IN 47902-1685
(t) (765) 532-3272
(f) (765) 423-2748
(e) tpeyton@nouv-eau.com
attorney pro se'

EXHIBITS 1, 2, 3

FRANCE-Intellectual Property Office (Institut national de la propriété industrielle – INPI)

1

Wine water

Submitter: UDM GROUP Union Agricultural Cooperatives
 Number: 4234744
 Class : 32
 status: application published

Eau de Vin

French brand Add to my list

2

WATER WINE

Submitter: Michael Paetzold
 Number: 3329823
 Class : 3, 32, 33
 status: Not in force

EAU DE VIN

French brand Add to my list

Marque française

EAU DE VIN

Marque française non en vigueur

Marque : EAU DE VIN
 Classification de Nice : 3 , 32 , 33

Produits et services

- Eau extraite de boissons fermentées à base de raisin, alcoolisée ou non alcoolisée (produit cosmétique) Boissons fermentées à base de raisin, alcoolisées, Boissons fermentées à base de raisin, non alcoolisées.

Déposant : Paetzold Michael, 14 route de Cabanac, Tartas, FR
 Mandataire : Paetzold Michael, 3700 avenue de Toulouse 33140 CADAUJAC, FR
 Numéro : 3329823
 Statut : Marque enregistrée
 Date de dépôt / Enregistrement : 2004-12-18
 Lieu de dépôt : INPI, BORDEAUX
 Historique

- Publication : 2005-01-21 (BOPI 2005-03)
- Enregistrement avec modification : (BOPI 2005-22)

Marque française

Trade mark

List of goods and services

Owner

Representative

Correspondence address

Seniority

Exhibition priority

Priority

International registration transformation

Publication

Opposition

Registration

Opposition

Appeals

Renewals

Trade mark

Eau de Vin

Eau de Vin

(210)/(260)Application number : 4234744

(270) Application language : fr

(270) Application date : 2015-12-17

Trade mark office : France - INPI

(250) Filing place : 92 INPI - Dépôt électronique

(190) Registration office : FR

(550) Trade mark type : Combined

(511) Nice classification : 32

Current trade mark status : Application published

(510) List of goods and services

Classification version

Mark standard character

FR

(511) Nice class number : 32

Marque française

EAU DE VIN

EXHIBIT 4 US PATENT 7569146
PRODUCT BY PROCESS CLAIM

The patentability of a product does not depend on its method of production.

20. A potable water product from ethanol fermentation still bottoms through a process to separate pasteurized still bottom liquid from solid organic and inorganic components by continuously subjecting the still bottom liquid to steps that further separate the organic and inorganic concentrate fractions of solids of lesser weight from the still bottom liquid with a sequence of steps to produce a predetermined composition and solids content in a rendered liquid selected from the group consisting of solids separation by centrifugation and evaporation and microfiltration and ultrafiltration and nanofiltration and reverse osmosis issuing said rendered liquid, an adjustment of pH step of the rendered liquid to a predetermined level of pH, a pressurized reverse osmosis step through a semi-permeable membrane of a molecular weight pore size between 50-100 Dalton producing a reverse osmosis concentrate and a reverse osmosis permeate, and a finishing step to the reverse osmosis permeate to yield the potable water product of low molecular weight solids of still bottoms used for recycling, discharge, or human consumption by bulk transport or bottling.

(1 of 1)

United States Patent
Peyton, et al.

7,569,146
August 4, 2009

By-products from fermentation still bottoms

Abstract

The disclosed invention is an improved method for treating ethanol distillation still bottoms by recovering, through solids separation and pressurized membrane filtration, potable water from still bottoms for human consumption by bottling or for reuse, and concentrating the solids with beneficial properties recovered such as chemicals, nutrients and medicinals before anaerobic digestion. The invention is an improved process because it can reduce the volume of solids to manage, recovers the water from the fermentation still bottoms while pasteurized, maintains the chemical and physical properties of solids for beneficial property recovery, improves ethanol and energy efficiency, and results in clean discharge to the environment including carbon dioxide recovery. A bioreactor produces a gas rich in methane fuel from the concentrate to power the pressurized filtration process and an aqueous ammonia solution to recover or recycle. This invention improves environmental quality, conserves energy, and produces a beverage water for bottling that can be of an organic origin with reliable source and quality.

Inventors: Peyton; Thomas O. (Lafayette, IN), Ahring; Birgitte Kiaer (Hoersholm, DK), Rohold; Lars Erik (Odense, DK)

Assignee: NouvEau Inc. (LaFayette, IN)

Family ID: 38442999

Appl. No.: 11/796,536

Filed: April 27, 2007

2009 Product Launch
Alliance Francaise-Chicago, March 7



NouvEau
Confidential



ROPP Flint Champagne Bottle
Crown or Screw Cap
187 ml, 375 ml, 750 ml

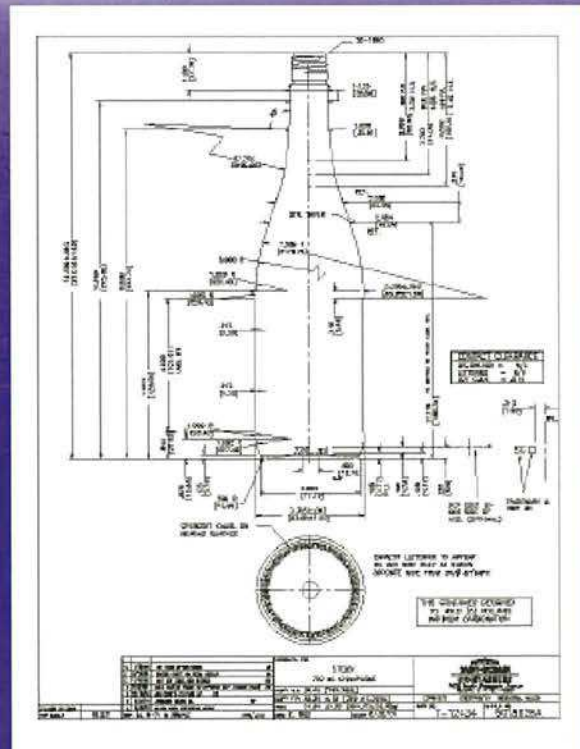


EXHIBIT 6

NOUVEAU INC

Sales Receipt

EAU DE VIN

Date: November 4, 2015
 Receipt No. 110415

Name: Pete Lazarus
 Address: Millennium Harvest Hotel
 Boulder, Colorado

Code	Description	Quantity	Price	Amount
Bottle #6	Sparkling-Eau de Vin-750 ml	1	\$ 10.00	\$ 10.00
	Freight			\$ -

Sale made by: Tom		Subtotal	\$ 10.00
		Discount	
		Sales Tax Rate	
		Sales Tax	\$ -
		Total	*****
		☒ Cash on Delivery	
Credit Card No.		Credit Card	
Check No.		Check	
Money Order No.		Money Order	

Thanks for your business!

NouvEau Inc, PO Box 1685, Lafayette, IN 47302



EXHIBIT 7

Labels



Tom Peyton <peyton.tom@gmail.com>

to Richard -

Richard,

Here's the presentation. I printed 5 copies to start. It may be a little too much with the grape vine border and bars but I figured I needed something specific for the topic.

I am reworking the non-disclosure to include an engagement for expenses and consulting fees.

Tom Peyton

3/24/07



Thomas O. Peyton, PhD
AmTech/DH2O
PO Box 1685
Lafayette, IN 47902
765 532-3272 cell
765 423-2748 home office



Business Development Proposal

A Table Water from Cognac

Aqua Vin Naturale
Eau Vin Naturel
eau de lune



March 2007
Distillers H2O
Division of Ambiofuels Ltd.
PO Box 1685
Lafayette, IN 47902

Thomas O. Peyton, PhD
President
(765) 423-2748

Proprietary Notice: The contents of this proposal are protected under the intellectual property laws of the United States Patent Office and European Patent Office as Patent Pending.

EXHIBIT 8

Eau de Vin

Inbox x



MOT In Bordeaux <peyton.tom@gmail.com>

3/30/07

to Jean-Marc, Charlie

Dear Mr. Olivier,

It appears Revico would benefit with a more concentrate we would provide after extracting the water but we feel Revico is not the appropriate location to process or make a bottled water from distillation of the wine or brouille and feel the Distillerie Charantaise Jubert has the space and appropriate setting for a test production.

I particularly like the fraction brouille that is much less acidic with a flavour and figure there is double this quantity than the brandy distilled and already the transport infrastructure to haul clean, say to a bottling plant, in stainless tankers what we feel meets FDA sanitary standards.

Our question is whether BeamGlobal will permit this work on your site 1) as a group effort to benefit Revico as a pretreatment, 2) as only a limited partner investor in the r&d, or 3) as a collaborative stakeholder in the improvement of Cognac technology. We do understand from Mr. Pinet there is not interest to market water in the spirit industry which the general partner would take on with retailers. As mentioned, we are particularly interested in examining some of the newer outsourced sales methods through the web to take orders, such as Salesforce.com.

It will of course be required that some form of written understanding (and if a stipend can be provided to assist us in our work from the group or BeamGlobal such as preferred stock) that will allow us to proceed in forming investors for the partnership to initiate the first phase this season. I will attempt to meet with Mr. Bertalan to see what BeamGlobal's opinion is regarding this business development activity. Thank you again and for the time yesterday.

Very truly yours,

Tom Peyton

Dr Thomas Peyton
President DH2O
PO Box 1655
Lafayette, IN 47902

EXHIBIT 9

Store in a cool dry place away from light. Avoid freezing. Best served chilled. Consume within 3 days after opening and keep refrigerated.

CA Redemption Value.
5c Refund CT, VT, ME, MA, OR, IA, NY, DE, HI (10c MI), NYHSD
Cert # , CT # , NV
No. --

Produced by
NouvEau France SARL,
2 Pl Jean Monnet,
16100, France.





NOUV EAUTM
AQUA VIN NATURALE[®]

2008

Premium and Vintage Water from Wine

NON-ALCOHOL

WITH NATURAL MINERALS AND ANTI-OXIDANTS.

PRODUCT OF FRANCE

750 ml - 25 fl oz (1 pt, 9 fl oz)

NUTRITION FACTS
Serving Size 8 fl oz (237 ml). Servings per container: about 3.

Amount per serving:

Calories	0	
		<i>% daily value*</i>
Vitamin C	(from mineral ascorbates) 12mg	20%
Potassium	3 mg	0.1%
Calcium	6 mg	1%
Magnesium	6 mg	2%

*% daily value based on 2000 calorie diet.
Not a significant source of carbohydrates, proteins or fats.

Ingredients: less than 0.05% alcohol in a water 99.9% purely from wine.

PROD:
BEST BY:

NOUV EAUTM
AQUA VIN NATURALE[®]

Aqua Vin Naturele is made from fine wines of southwest France. Fresh from wine stills after the making of superior brandy, the aqua vin is re-distilled, filtered and mineralized carrying trace alcohol in equilibrium with body chemistry. A unique vintage water reflecting the vineyard's microclimates and mineral rich soils, Aqua Vin Naturele captures the rare natural beauty and elegance of southwest France.