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

Proceeding	91225185
Party	Plaintiff NouvEau Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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NOUVEAU INC.)	
Opposer,)	Opposition No. 91225185
)	
v.)	
)	Mark: VINEAU
DON SEBASTIANI & SONS INTERNATIONAL)	Serial No. 86-643,989
WINE NEGOTIANTS,)	
)	
Applicant)	
_____)	

**OPPOSER’S RESPONSE TO APPLICANTS MOTION TO DISMISS
Federal Rule of Civil Procedure Rule 8(a)(2) & (3)**

I. INTRODUCTION

Opposer NouvEau, Inc. respectfully moves the Board to deny Applicant’s Motion to Dismiss (MTD) and reaffirms the factual matters set forth in its 2016 Amended Notice of Opposition (ANO) and together with the statutory grounds for denial of Applicant’s registration of a proposed mark VINEAU meaning “WINE WATER,” in Class 032 non-alcoholic beverages on the Principal Register or Supplemental Register.

The Trademark Trial and Appeals Board (TTAB) has jurisdiction for opposition to trademark registration under TTMP 300. Opposer must show standing 309.03(b) and in addition to standing, Opposer must also plead (and later prove) a statutory ground or grounds for opposition or cancellation under 309.03(c) of an opposed mark.

Though Applicant does not contest Opposer’s standing per se, Applicant references Opposer’s credibility in doing so in its Motion to Dismiss 13TTABVUE2 and in procedure 13TTABVUE7B. Opposer wishes to reassert that there is a duty on behalf of NouvEau, Inc. to protect its property under the U.S. Constitution. It is settled law pursuant to US Supreme Court

rulings that “however inartfully pleaded,” pro se are held ‘to less stringent standards than formal pleadings drafted by lawyers,’ see *Haines v. Kerner*, 404 US 519, 520 (1972); *Maclin v. Paulson*, 627 F.2d 83, 86 (CA 7 1980); *French v. Heyne*, 547 F.2d 994,996 (CA7 1976).

Applicant in its Motion To Dismiss alleges that Opposer has not stated a claim where a remedy can be sought. Applicant is incorrect. Opposer has clearly stated statutory grounds beyond mere recitals supporting its allegations with sufficient factual matter as set forth below.

II. GROUNDS FOR DENIAL

A. Unique Product Patent: Descriptive & Generic Trademark Rights Preclude Applicants VINEAU mark.

The term “trademark,” defined at 15 U.S.C. 1127, includes “a unique product.” Unique products are also defined and protected by composition of matter patents and have a descriptive name that describes their uniqueness, and are protected as their statement of identity as proprietary marks of the owner and trademarked as descriptive until they become generic names recognized by the general public and is clearly stated by Opposer with case law including Supreme Court Rulings (ANO 5&6 12TTABVUE3-4). Examples of words that once had unique product trademark significance but have since passed into the public domain as generic include “shredded wheat” (*Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938), and “cola” (*Dixi-Cola Labs., v. Coca-Cola Co.*, 117 F. 2d 352 (4th Cir.), cert. denied, 314 U.S. 629 (1941); accord, *Coca-Cola Co. v. Snow Crest Beverages, Inc.*, 162 F. 2d 280 (1st Cir.), cert. denied, 332 U.S. 809 (1947)).

WATER FROM WINE, EAU DE VIN, WINE WATER are Opposer’s descriptive marks in use in commerce to describe its unique patented product and clearly set forth in Opposer’s ANO and are legal grounds to dismiss registration of VINEAU (WINE WATER) mark as confusingly similar under Lanham 2(d) to the unique proprietary source of WATER FROM WINE, EAU DE VIN, WINE WATER, Opposer’s unique product under patent.

B. Applicant’s Motion to Dismiss III Factual Background 13TTABVUE4- ¶ 1, Misstates Nouveau’s Patent Rights.

In spite of Applicant’s attempt to recharacterize and mislead on the source of Opposer’s patent rights as being the solid biomass remaining at the bottom of barrels and tanks

of the wine fermentation process, Applicant is wrong and falsely misstated the clear and obvious source of Opposer's unique patented product. The source of Opposer's unique product rights are clearly stated in Opposer's Amended Notice of Opposition ANO 2, 12 TTABVUE 2-3, and specifically by law as its property in US Patent 7569146 Claim 20, the source being the water remaining after the distillation of alcohol from wine that is filtered to make the unique potable product "water from wine":

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."

To correctly state as FACTUAL BACKGROUND in direct reference to 2 12 TTABVUE 2-3, Applicant would need to say (where stood corrected underlined and highlighted in red):

NouvEau owns U.S. patent rights in a product consisting of potable water extracted ~~from the residual biomass of a fermentation process.~~ from liquids remaining after distillation of alcohol from fermented sugar (fruit) and starch (grain) feedstock to make a unique patented potable water product. (Amended NOO ¶2, 12 TTABVUE 2-3.) ~~Such a fermentation process includes the production of wine. NouvEau claims exclusive rights in potable water extracted from mass remaining in the bottom of barrels and tanks used to produce wine.~~ "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." It also owns patent rights in France for the method to make this potable water product. (Amended NOO ¶3, 12 TTABVUE 3.)

Opposer clearly has unique product patent claim to “water from wine” that Applicant’s VINEAU is attempting to mislead as to source in false statement of fact.

C. Opposer Established A Valid Claim and Claims Under Lanham 2(e)(1), 1(b), 2(d).

As an additional ground for denying Applicant’s Motion to dismiss, Opposer has stated that, under the Lanham Act 2(d), Applicant’s proposed mark VINEAU is confusingly similar if not identical to Opposer’s equivalent marks in prior use. “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it— (e) consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them.”

Both EAU DE VIN and VINEAU carry the same transliteration between the French and English meaning and VINEAU so closely resembles, even if it is not identical in French, to “EAU DE VIN” or “WATER FROM WINE” or “WINE WATER” as to confuse the consumer as to source.

Opposer has stated as grounds for opposing VINEAU ¶1 12TTABVUE2 and Exhibits 1,2,3 that in French-English transliteration VINEAU conveys the same meaning WINE WATER, EAU DE VIN, and WATER FROM WINE. Foreign translations shall have the same meanings as English in US trademarks. 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. As set forth in Opposer’s previous filings, VINEAU’s registration should be denied as confusingly similar to those in rightful use by NouvEau.

D. NouvEau has Prior Use and Approval of VINEAU would be a Violation of Lanham 2(e)(1) and Lanham 1(b).

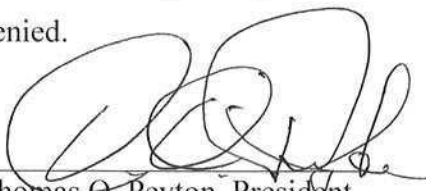
Opposer’s opposition is based on its proprietary rights to its use of its mark from the statement of identity of Opposer’s unique patented product “EAU DE VIN” or “WATER FROM WINE,” “EAU DE VIN” meaning “WATER FROM WINE” and “WINE WATER”. For over eight years these marks have been used by NouvEau in commerce and in Class 032 non-alcoholic beverages to describe its unique patented water product made from

wine. VINEAU, a wine flavored imitation groundwater that has not yet been introduced in commerce, is proposed to be sold by Applicant as WINE WATER or WATER FROM WINE. Opposer's WATER FROM WINE, WINE WATER and EAU DE VIN marks have been in constructive and commercial use as a unique product of Opposer's product patent since 2007 (¶4 12TTABVUE3). In Class 032 Non-alcoholic beverages; the goods namely carbonated beverages, non-alcoholized wines, water beverages, are in use under these descriptive names and are all unique and proprietary to NouvEau under product patent as manufactured from wine with FDA required statement of identity WATER FROM WINE on its label and used to describe its goods.

Although Applicant applied on May 20, 2015 to register its VINEAU or WINE WATER mark with Intent To Use (ITU) under Lanham 1(b) Class 032 product goods with intent to use in commerce: Non-alcoholic beverages; "flavored waters" and "other water beverages," Applicant had no prior use in commerce or statement of use. Applicant's 1(b) ITU has no priority over Opposer's 1(a) SOU with commercial use of the descriptive mark of Opposer's unique patented product for eight years preceding. See *Central Garden & Pet Company v. Daskocil Manufacturing Company, Inc.* 108 USPQ2d 1134 (TTAB 2013) (precedential)).

III. CONCLUSION

NouvEau has standing and has clearly stated grounds for its claims in opposition to Applicant's attempt to register VINEAU as a trademark. Applicant's Motion to Dismiss should be denied.

By 
Thomas O. Peyton, President
NouvEau Inc.

Date June 25, 2016

CERTIFICATE OF SERVICE
TTAB/ Opposition No. 91225185

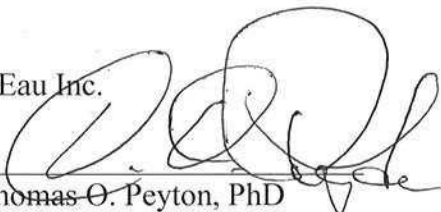
I hereby certify that a true and complete copy of **Response to Motion to Dismiss** has been served on Warren Dranit, Attorney for Applicant, Don Sebastiani & Sons International Wine Negotiants, by transmitting such copy filed electronically with the Trademark Trial and Appeals Board on June 25, 2016 by email and by regular mail to:

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