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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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Attachments	Plaintiff's Response 91225185_to Motion to Dismiss.PDF(3242772 bytes)

water) and is strictly descriptive. VINEAU should be disallowed on both counts, being purely descriptive of wine and water ingredients in addition to causing damages under Lanham 43 (a) to Opposer's proprietary EAU DE VIN mark that is merely suggestive and distinct for its patented product made generically from distilled spirits water.

I. INTRODUCTION

NouvEau is opposing *pro se* and it is settled law pursuant to US Supreme Court rulings that "however inartfully pleaded" 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 by record and admission (AMD I. para 2). is claiming its mark covers "flavored waters," admitting a wine flavored water by name constituting a composition of matter and descriptive mark VINEAU (wine water); but also vaguely "other waters" that may be infringement on NouvEau's composition of matter product by process patent rights to a non-alcoholic beverage made from a genus of spirits (EAU DE VIN).

Opposer's request to strike Applicant's defense of motion to dismiss and to proceed to discovery and trial for knowingly or unknowingly infringing on Opposer's rights in respect to Lanham 43(a) is the substance of opposition proceedings and is *prima facie* obvious under trademark law as Opposer's pleadings for claims to relief are clearly stated under Federal Rule of Civil Procedure 8(a), and it is not that Applicant is violating the rules of the US Food and Drug Administration (FDA) as the grounds for opposition. Applicant's assertions are an insufficient defense and are misleading, redundant, and impertinent and motion to dismiss should be struck under Federal Rules of Civil Procedure 12 (f).

Therefore, NouvEau's opposition proceedings must be allowed as it clearly states direct grounds in 1-8 of its NOO *prima facie* and the Trademark Trial and Appeals Board ("Board") is the appropriate venue for opposing the mark at this juncture in opposition proceedings and not the US Food and Drug Administration (FDA) as Applicant detracts to.

II. STANDARD OF REVIEW

Opposer's basis on the grounds of its claims are short and plain and obvious and has satisfied all elements of Federal Rule of Civil Procedure 8(a) and applicant's motion to dismiss is without merit and moot and should be denied under Federal Rule of Civil Procedure 12(f) as redundant, immaterial, impertinent and without merit.

III. FACTUAL BACKGROUND

NOUVEAU¹ owns a French and US patent in a composition of matter product patent of potable beverage obtained after the fermentation of grain or fruit sugars to alcohol whereby said alcohols are separated into distilled spirits and NouvEau upgrades the non-alcoholic liquid left behind under patented process to a non-alcoholic patented potable beverage for bottling. The full taxonomy of EAU DE VIN brand is:

CLASS:	Non-Alcoholic beverage
ORDER:	Non-water (source)
FAMILY:	Single source
GENUS:	Spirits
SPECIFIC:	Fruits
SUBSPECIFIC:	Grape (vigne)

Whereby in the absence of further discovery of description the full taxonomy of VINEAU is:

CLASS:	Non-Alcoholic beverage
ORDER:	Water (source)
FAMILY:	Mixed ingredient
GENUS:	Flavored waters
SPECIFIC:	Wine flavored water
SUBSPECIFIC:	Wine in water

The EAU DE VIN mark is only suggestively descriptive as generic and is more fanciful than VINEAU (wine water), the latter that is fully descriptive of two combined exact materials

¹ NouvEau Inc. was established in 2004 as an international intellectual property holding company performing research and development and small FDA approved laboratory to perform small scale proof of concept and sales of trademarked and branded non-alcoholic and alcoholic beverages from its patented and proprietary products. It has had six registered and/or applied for trademarks for its family of fanciful Eau de Sprit (water of spirits) beverages with three serial numbered trademark applications including Eau de Vin in US Federal registered trademark application phase. It has recently (December 2015) license d its European French Patent in France to a spirit distiller that uses the fanciful name Eau de Vin to describe its product in European commerce and with NouvEau Inc. agreement to license bottling of the same in the United States under separate sovereign product patent rights owned by NouvEau who has processed bottled their Eaux de Sprit and sold in US commerce with brand mark in November 2015 as stated in Trademark Serial application no. 86810563.

making it generically descriptive mark that also confounds with the EAU DE VIN mark. EAU (water) in EAU DE VIN is not water source and VIN (wine) in EAU DE VIN is not a wine additive but is altogether a single source derivation far removed from water and wine. EAU DE VIN is not a mixed ingredient beverage as VINEAU is. EAU DE VIN is only suggestively related to a far removed precursor, the fermented grape species of a fruit (VITIS or VIGNE). Therefore, EAU DE VIN is much more fanciful and non-generic and unique in comparison to VINEAU (wine water) the latter Applicant's mark, that is an exact description of its two mixed ingredient materials and is purely generic and not unique and whether through self-admission or not, it is implied as made by Don Sebastiani & Sons (DSS) International Wine Negotiants, that is primarily a vineyard company making wine, as a wine flavored water.

Further, NouvEau's water of spirits (EAUX DE SPRIT) refers to its genus of product as generic and scientific name (generic statement of identity) when the fermented sugars are derived from fruits such as VITIS (grapes to make wine) or when the sugars are derived from the carbohydrates of POACEAE (grains-such as corn and rye to make Bourbon whiskey). Alcohol boils before water and the alcohol first leaves the top of distillation process upon heating the contents to physically separate (pot or column still) where the spirit is removed from the higher boiling point liquids containing a separated water solution that remains on the bottom of the still wherein NouvEau claims exclusive product rights to the refined liquids from these bottoms of distillation of fermented and distilled grains and fruit sugars. Applicant's references to solid biomass in the bottom of barrels and tanks (AMD III, para 2) are immaterial, impertinent, false, and egregiously negligent and misleading in statement of fact. US Patent 7569146 claim 20 is attached as Exhibit 1.

NouvEau applied for trademark after having used EAU DE VIN as a suggestive mark since 2008 in a vague and fanciful description of the water of spirits from fermented grapes and has sold bottles under this trade name as well as its use as a suggestive statement of identity. EAU DE VIN is merely suggestive of the generic scientific description water of spirits (EAUX DE SPRIT) whereas Applicant's VINEAU mark is absolutely descriptive of a wine flavored water combining two sources: wine (VIN) and water (EAU) to make VINEAU (wine water) and is not unique or arbitrary and can not be trademarked on its own and from Opposer's view

constitutes a fraudulent mark of Opposer's less descriptive mark and more fanciful mark EAU DE VIN where VINEAU applied for mark will also cause confusion to the consumer in the market place of NouvEau's prior use mark in commerce.

IV. LEGAL DISCUSSION

A. Opposer Can Establish a Valid Claim Under Lanham Act 2(d)

Trademark infringement is the unauthorized use of a trademark or service mark on or in connection with goods and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods and/or services. Applicant's proposed mark is an exact description of it's combination of two separate sources, wine (VIN) and water (EAU) to make VINEAU (wine water) that is strongly connected in a manner to cause confusion and deception to Opposer's proprietary rights in its prior use of EAU DE VIN mark to brand and market its species of fruit feedstock from a singular distilled spirit source that has been a product patent since 2004 and has been in prior use as a suggestive trademark describing NouvEau's water of fermented fruit sugars since 2008. NouvEau justifiably asserts Applicant's mark VINEAU (wine water) will cause confusion, deception, or mistake about the source of the goods being NouvEau's more unique and exclusive EAU DE VIN mark that is more a trademark than a suggestive and generic statement of identity made only generic as a subspecies of the more generic Eaux de Sprit (water of spirits) scientific statement of identity.

As VINEAU is a combination of two generic well known separate sources (wine watered down with ground water) and EAU DE VIN is a unique singular source from the spirits distillation process; Applicants sources are clearly combined wine and water and Opposer's source is neither wine nor water but the remaining distillation liquids of spirits making NouvEau's EAU DE VIN mark distinct and unique and only suggestive and not descriptive of source or content. To contrast, the VINEAU sources are mixed generic water with generic wine additives whereas EAU DE VIN source is a singular distinct spirit water of fruit fermented alcohol distillation, a virgin material of unique composition of matter requiring no mixing or combination of generic materials. Water is a source term and Opposer's mark is not water but a non-alcoholic beverage sourced from alcohol spirit. The family of Opposer's product is non-alcoholic beverage as statement of identity and the genus of this statement of identity is a source from spirits. Applicant's mark VINEAU will cause

confusion in the market to consumers with EAU DE VIN as well as being an imitation of water from wine as a branded statement of identity of a branded descriptive product.

In summary, EAU DE VIN is a suggestive mark that NouvEau has used as a brand to describe its patented bottled beverage product derived from the singular source of spirit distillation when fruit matter is distilled to make distilled spirits and is used both as a suggestive trademark and a subspecies of identity of the non-alcoholic beverage derived from spirit distilleries since 2008 that has been patented as a product since 2004. VINEAU, on the other hand, is a combination of two separate sources: wine and ground water, and is a direct description of its combination of wine and water (VINEAU) and Applicant has not yet introduced its product mark in commerce whereas EAU DE VIN has. Therefore, as EAU DE VIN takes precedent as proprietary in both mark usage, introduction into commerce, its composition of matter patent from a singular unique source over ten years ago, and by virtue of opposing VINEAU with the Notice of Opposition and statements of fact, Opposer has well established in grounds 1-6 of its Notice of Opposition its proprietary rights of EAU DE VIN as a trademark under Lanham Act 2(d) whereas VINEAU constitutes imitation and fraud of a confusingly similar mark to *a priori* fact that is actually purely descriptive of a combination of a water source and wine source to make a confusingly similar mark VINEAU to the consumer under Lanham 43(a).

B. Opposer has fully satisfied its claim for relief in Notice of Opposition

Under Federal Rule of Civil Procedure 8(a) NouvEau has fully satisfied all pleadings that states a claim for relief in its Notice of Opposition and Rule 12(f) Applicants Motion to Dismiss should be denied and struck and proceedings to discovery and trial should commence:

NouvEau has submitted its short and brief statements clearly on grounds of opposition in its Notice of Opposition to the proper jurisdiction in a timely fashion with service,

It has submitted its short and plain statement of the claims showing that the pleader is entitled to relief;

It has made demand for relief sought that the use of of Applicant's mark VINEAU in international class 32 is false and misleading and can not be used as a fanciful mark (therefore dismissed); VINEAU is a statement of identity on its own describing its own wine water

mixture product and can not be used as a mark (therefore dismissed); and as an alternative or different type of relief, the VINEAU mark be preceded by “Imitation” avoiding its confusing similar brand in the market to the singular source EAU DE VIN that has proprietary rights.

Therefore Applicant’s Motion to Dismiss should be denied.


V. CONCLUSION

EAU DE VIN (water of wine) is only suggestively descriptive generically for the genus of its product; it is not a water but a non-alcoholic beverage made from the spirit distillation process and is a unique singular virgin source material originating from grapes and was invented in 2004 and the mark first used in commerce as early as 2008 and sold under the brand name EAU DE VIN in November 2015 in the United States. FDA regulations are irrelevant and moot but all foods including waters and non-alcoholic beverages in International Class 032, unlike other trademarked materials that are outside of the food class, must also comply with FDA labeling regulations and were brought to the attention of the Board in NouvEau’s opposition not as grounds for denial of NouvEau mark, but as corroborating evidence for relief. NouvEau has clearly claimed valid grounds for opposition to DSS application to register VINEAU under the Lanham Act. NouvEau requests the Board deny the Applicant’s Motion to Dismiss NouvEau’s claims as NouvEau has clearly stated claims upon which relief can be granted. Because NouvEau’s claims are viable, the Motion to Dismiss should be denied and proceedings of discovery and trial should commence without amendment.

Respectfully submitted,

NOUVEAU INC.

By: /top/


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5 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 con-
tinuously subjecting the still bottom liquid to steps that fur-
10 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 evapo-
5 ration and reverse osmosis issuing said rendered liquid, an
adjustment of pH step of the rendered liquid to a predeter-
mined 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 concen-
10 trate and a reverse osmosis permeate, and a finishing step to
the reverse osmosis permeate to yield the potable water prod-
uct of low molecular weight solids of still bottoms used for
recycling, discharge, or human consumption by bulk trans-
port or bottling.

CERTIFICATE OF SERVICE
TTAB/ Opposition No. 91225185

I hereby certify that a true and complete copy of **Opposer's Response to Applicant's Motion to Dismiss** (Federal Rule of Civil Procedure Rule 8(a) and Rule 12(f)) has been served on Warren Dranit, Attorney for Applicant, Don Sebastiani & Sons International Wine Negotiants, by transmitting such copy filed with the Trademark Trial and Appeals Board on January 28, 2016 by email and by certified mail to:

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