ESTTA Tracking number: **ESTTA679291**
Filing date: **06/22/2015**

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

Proceeding	85908330
Applicant	Land Sky Sea, LLC
Applied for Mark	CORONA
Correspondence Address	EZRA SUTTON, ESQ. LAW OFFICES, EZRA SUTTON, P.A. 900 ROUTE 9 N STE 201 WOODBRIDGE, NJ 07095-1024 UNITED STATES trademarks@ezrasutton.com
Submission	Appeal Brief
Attachments	CORONA- Appeal brief June 22 2015.pdf(357910 bytes) CORONA- Exhibit- Definition of Corona tobacco cigar.pdf(17045 bytes)
Filer's Name	Joseph E Sutton
Filer's e-mail	trademarks@ezrasutton.com
Signature	/JS/
Date	06/22/2015

DOUEK 10.1-006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re trademark application of: Land Sky Sea, LLC. Serial No.: 85/908330 Filed: April 18, 2013 Mark: **CORONA**	Examiner Marilyn D. Izzi Law Office 112 June 19, 2015

Hon. Commissioner for Trademarks

P.O. Box 1451

Alexandria, Virginia 22313-1451

APPEAL BRIEF

Please accept this appeal brief on behalf of the applicant in the above-identified case.

Background & Procedural History:

The mark has been refused registration based on the allegation of being merely descriptive.

Applicant amended the identification of goods and reclassified same to class 034, as suggested in the Examining Attorney's office action, in its Response filed on September 15, 2014, as follows:

Electronic cigars, namely, electronic device to heat liquids to create a vapor for a human to inhale by mouth **being** a battery, an LED light source, a mouthpiece, and a cartomizer, **in the nature of** a compartment for the fluid to be heated, a heating coil, and a vaporizing chamber, in class 34---

Arguments:

The Examining attorney has maintained a refusal alleging that the proposed mark is **descriptive** under Section 2(e)(1)in relation to the identified product. The office actions attached web pages, including online dictionary definitions, that purport to show that the term **CORONA** refers to a certain type and size of a conventional **tobacco cigar** (5 ½ to 6 inches long and having a ring gauge of 42-44, per the Merriam-webster.com and the cigaraficianado.com attachments to the office actions, describing a CORONA type of conventional cigar).

Firstly, it should be noted that Applicant's product is an **electronic** inhaling device. Also, it **does not contain tobacco**, but rather certain liquids that are heated into vapor form. Based on these different features, it is therefore not a conventional tobacco cigar, which is what is referred to in the above-referenced

attachments to the office actions. Essentially, most of the evidence submitted by the examining attorney refers to tobacco-based conventional cigars, which are not electronic. These two sources of "online definitions" of the term CORONA are not probative evidence, since they do not refer to Applicant's specific goods identified in the application. There is **no evidence** presented in the office actions that would indicate that a substantial portion of U.S. consumers believe that the term **CORONA,** as used for an electronic non-tobacco cigar, is "merely descriptive" of Applicant's product and would not be viewed as a trademark. The attachments to the office actions also do not show consumers referring to electronic inhaling devices using the term CORONA.

The Four Web Sites Attached in Support of Descriptiveness

As will be shown, when reviewed in totality, the four web sites referenced in the office actions in support of the descriptiveness refusal are not sufficient evidence that the term **CORONA** is widely understood by a substantial portion of average purchasers to refer to and describe a type of electronic non-tobacco inhaling device. The PTO has the burden of establishing significant evidence that the Applicant's mark would be understood by a substantial portion of the public as "merely descriptive" of Applicant's specific product.

The purported evidence regarding the **CORONA** electronic cigar from HDSMOKE.com is dated March 13, 2014, whereas the present application was filed on April 18, 2013. Therefore, such evidence is not admissible to retroactively prove that Applicant's trademark was descriptive as of Applicant's filing date. Secondly, the term used is HDCORONA, not CORONA. Thirdly, the web page states that "the HDCORONA cigar looks like a real Corona-style cigar." However, Applicant's product does NOT look like a Corona-style conventional tobacco cigar, and has different dimensions and a different shape than a Corona-style conventional tobacco cigar (see informational document, attached). Thus Applicant's mark CORONA cannot be deemed to "merely describe" a feature or characteristic of its electronic non-tobacco inhaling device.

The second of the four web sites, electriccigars.net, states that "the e-cigar features here tastes just like a Cuban or Havana cigar in the Corona style." However, Applicant's product does NOT look like or imitate a Corona-style conventional tobacco cigar, and has different dimensions and a different shape than a Corona-style conventional tobacco cigar (again, see informational document attached). Thus Applicant's mark CORONA cannot be deemed to "merely describe" a feature or characteristic of its electronic non-tobacco inhaling device.

The third of the four web sites referenced, smartsmoke.com, offers for sale "The Belvedere Smart Smoke Cigar", and then states that it is "comparable to 6 domestic traditional Grand Corona cigars. Length 5 5/8 to 6 5/8. Ring Gauge of 45-47." However, Applicant's product does NOT look like or imitate a Corona-style conventional tobacco cigar, and has different dimensions and a different shape than a Corona-style conventional tobacco cigar (again, see informational document attached). Thus Applicant's mark CORONA cannot be deemed to "merely describe" a feature or characteristic of its electronic non-tobacco inhaling device.

The fourth web site is vaparillos.com. It states that "this electronic cigar is a timeless original. It's sleek innovative style will remind you of your favorite 7 [inch] Corona style cigar." Again, Applicant's product does NOT look like or imitate a Corona-style conventional tobacco cigar, and has different dimensions and a different shape than a Corona-style conventional tobacco cigar (again, see informational document attached). Thus Applicant's mark CORONA cannot be deemed to "merely describe" a feature or characteristic of its electronic non-tobacco inhaling device.

Moreover, the lack of evidence in the office actions shows that the PTO has not met its burden of proof of establishing that a "substantial portion" of U.S.

consumers understand the term **CORONA** to refer to or merely describe the features of an *electronic inhaling device* which **does not contain tobacco**. Rather, the term **CORONA**, as used on or in connection with an electronic, non-tobacco inhaling device, would be understood by most of the public as being an arbitrary or coined term. A term should be characterized as "merely descriptive" only if a **substantial portion** of prospective customers recognize it as such on the relevant goods, in this case electronic non-tobacco inhaling devices. Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 131 U.S.P.Q. 55 (2d Cir. 1961) (holding as to **POLY PITCHER** that the number of people who understood "poly" to be synonymous with "polyethylene" was inconsequential). The Federal Circuit has said that for purposes of registration, descriptiveness is to be tested from the viewpoint of the **average purchaser**. In re Omaha Nat'l Corp., 819 F.2d 1117, 2 U.S.P.Q.2d 1859 (Fed. Cir. 1987).

Therefore, there is no significant or widespread evidence that the term **CORONA**, to be used in connection with Applicant's **electronic** inhaling device that does **not contain tobacco**, would be recognized as being "merely descriptive" by a substantial portion of the "prospective customers" or "average purchasers" in the U.S.

Thirdly, the definition of "CORONA" refers to conventional tobacco cigars that are "5.5 to 6 inches in length, with a ring gauge of 42-45." (See web page from CigarChoiceGuide.com, attached). Therefore, since Applicant's product does not meet these dimensions of a CORONA-style conventional tobacco cigar, Applicant's mark CORONA is not "merely descriptive" of the Applicant's product. Further, Applicant is willing to describe its product as not having these conventional dimensions, if the PTO requires it.

Lastly, the second office action referred to the above-mentioned four electronic cigar web sites (HDSmoke.com, electriccigars.net, smartsmoke.com, and vaparillos.com) that are selling a product meant to imitate a conventional CORONA-style tobacco cigar. In contrast, Applicant's product does not "replicate" or imitate a conventional tobacco cigar, and Applicant respectfully submits that this statement in the second office action is incorrect. Applicant's product is an electronic inhaling, non-tobacco product that has different dimensions and a different shape from a conventional CORONA-style tobacco cigar. As such, it does not imitate or "replicate" a Corona style tobacco cigar. Again, Applicant is willing to describe its product as not having these conventional dimensions or shape, if the PTO requires it.

It should also be noted that the second office action referenced prior registration No. 0092892 for the mark **LA CORONA**, for conventional tobacco "cigars." The fact that the Trademark Office granted a registration on the Principal Register for such a mark as used on conventional tobacco cigars means that the term **CORONA** was held distinctive and not merely descriptive of conventional tobacco cigars. This registration has also not been cancelled for over 100 years, and is still valid and subsisting on the Principal Register. At the same time, there is also no significant widespread evidence that the term **CORONA** should be held by the PTO as merely descriptive of electronic non-tobacco inhaling devices.

It is therefore respectfully requested that the Section 2(e)(1) descriptiveness refusal be withdrawn.

Cited U.S. Reg. No. 0092892

The Examining Attorney has maintained the citation the above registration under Section 2(d) and has alleged that this mark, for use on conventional tobacco "cigars", is likely to lead to source confusion with the Applicant's mark as used in connection with Applicant's electronic non-tobacco inhaling devices.

Here, the '892 registration was issued in 1913, and the goods are in international class 34 and are limited to *cigars*, i.e., conventional tobacco cigars

(the PTO can take judicial notice that **electronic** non-tobacco cigars/inhaling devices did not exist in 1913). Therefore, the nature of the goods are different from the amended identification of goods of the current application. Specifically, the goods in the '892 registration lack numerous components of Applicant's goods, including a battery, an LED light source, a mouthpiece, and a cartomizer, in the nature of a compartment for fluid to be heated, a heating coil, and a vaporizing chamber.

Further, the types of customers are different, since Applicant's customers are specifically purchasers of an electronic, non-tobacco product, unlike the conventional tobacco cigars listed in the '892 registration. These segments of the market are different, and so the channels of trade are different.

Applicant's customers do not smoke conventional tobacco cigars; they use Applicant's electronic inhaling device, which does not have tobacco, but rather certain types of **flavored vapors** which are very different from the **smoke** emitted from burning tobacco. In addition, the channels of trade and customers for Applicant's type of goods are online retailers and traditional retail stores, who then resell the goods to individual consumers who purchase non-tobacco, electronic inhaling devices. Thus, the customers, and channels of trade are different for

Applicant's product, as compared to those customers who buy the conventional tobacco products covered by the cited registration.

Further, Applicant's product has different dimensions and a different shape than a tobacco-based CORONA styled conventional cigar, as discussed above.

In view of all of the foregoing reasons, it is requested that the cited '892 registration under Section 2(d) be withdrawn.

Respectfully submitted,

Law Offices,

EZRA SUTTON, P.A.

By: Joseph Sutton

Joseph Sutton, Esq.,

Attorney of record

Jsutton@ezrasutton.com

732-634-3520

Dated: June 19, 2015

Browse By Type

Corona
Panatela
Lonsdale
Churchill
Robusto
Toro
Presidente
Torpedo
Diadema

Corona Cigars

Corona Cigars ar 5.5 to 6 inches long with a ring gauge of 42 to 45. They are **Parejo** shaped and are one of the most popular cigar types.

Coronas are made in numerous cigar manufacturers accross the globe but like the majority of cigar types they origninated from South America.

The majority of cigars fall into the corona bracket.

Examples

Charatan Corona
Length: 5.5 inches Ring gauge: 42

Quorum Corona
Length: 5.5 inches Ring gauge: 43

Partners

wine

Site Map : powered by the Livotech - minisite™ North Wales Web Design System