

ESTTA Tracking number: **ESTTA444244**

Filing date: **12/02/2011**

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

Proceeding	91197754
Party	Defendant Lavatec, Inc.
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Date	12/02/2011
Attachments	ApplntReply.pdf ( 7 pages )(321291 bytes )

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

In the matter of Trademark Application No. 76701998  
for the mark: LAVATEC  
Published on November 2, 2010

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Wolf-Peter Graeser,	)	
	)	
Opposer	)	
	)	Opposition No. 91197754
v.	)	
	)	
Lavatec, Inc. (fka Laundry Acquisition Inc.)	)	
	)	
Applicant	)	

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**APPLICANT'S REPLY IN SUPPORT OF DOCUMENT RELEASE FOR  
TRANSLATION**

**1. OPPOSER'S FAILURE TO JUSTIFY HIS REFUSAL**

In opposing Applicant's Motion seeking its own English translation of a certain Asset Purchase Agreement relied upon by Opposer for his claim to the opposed LAVATEC mark, Opposer has failed to provide one reason why adherence to the provisions of the Board's Standard Protective Order, in particular, Paragraphs 4 -5, will not preserve the claimed confidentiality of the Agreement.

Opposer asserts that the Agreement has "high commercial sensitivity" and "many trade secrets" (Opposer's Response, Par. 7). But that is what the Protective Order is designed to protect. Opposer fails to point out any deficiencies in the procedures of the Order that will jeopardize the confidentiality.

Additionally, the only possible trade secret in the Agreement might be the purchase price, but that is known by Applicant already. The rest of the Agreement deals with assets included and not included, warranties and liabilities, and other conventional

language such as found in most asset purchasing agreements. The Agreement is not a technology transfer agreement containing valuable trade secrets.

Opposer's sole justification for refusing to give Applicant permission to obtain a translation is that the partial translation prepared by Opposer's counsel ( see Applicant's Exh. 5) has been certified as correct by a German Honorary Consul (not "counsel"). The justification has nothing to do with the provisions of the Protective Order. Opposer is simply saying Applicant does not need a translation because Opposer provided one prepared by Opposer's counsel. How absurd to suggest that Applicant must accept Opposer's evidence with no opportunity to challenge. Opposer is simply using the confidentiality claim as a shield against challenge.

## 2. OPPOSER'S TRANSLATION IS UNTRUSTWORTHY

Beyond the absurdity that Opposer's translation cannot be challenged are several realities indicating that Opposer's translation is untrustworthy.

The translation was prepared by Opposer's German counsel and was allegedly certified by a German Honorary Consul in Denver. However, the translation is only a partial translation, which means that Opposer's German counsel selected the portions translated. In the process he omitted a critical reservation clause putting Opposer on notice that Opposer was not purchasing exclusive rights to the LAVATEC designation because Applicant holds rights to the name. The omission was pointed out by Applicant and afterward Opposer's translation of the reservation clause was provided. Opposer's counsel attempted to cover up the glaring omission with the incomprehensible statement that the reservation clause has nothing to do with intellectual property rights (Applicant's Exhibit 4, Opposer's Response, Par. 17).

Opposer's translation contains numerous errors, such as " indisputable mistakes, the insertion of words having no counterpart in the German, and the duplication of terms where there is no duplication in the German.

Opposer's counsel, speaking in the present tense rather than explaining what actually happened, describes the certification process hypothetically as having the German Honorary Consul "review and edit" the translation provided by Opposer before

certification (Opposer's Response. Par. 25). Applicant has received two copies of the translation prepared by Opposer's counsel, one of which has been certified by the German Honorary Consul and one not certified. The certified copy is simply a duplicate copy to which the certification has been applied. The identity of the certified and uncertified copies indicates no editing took place.

The errors and absence of any editing indicate rather clearly that the German Honorary Consul did not give careful consideration to the translation from Opposer's counsel before applying the certification.

Opposer claims the German Honorary Consul is independent and was not selected by Opposer (Opposer's Response, Par. 27), but never explains how Opposer's counsel was connected with the Consul in Denver where Opposer's counsel also has an office. The supposedly independent Consul for reasons unknown has failed to respond to or communicate with Applicant in spite of Applicant's attempts to make contact. See Applicant's Exhibit 6. Yet, based upon the subsequent certification of the translated reservation clause, the Consul has maintained contact with Opposer's counsel. Hence the Consul, his certification, and independence are not endorsed by Applicant.

More subtle and more deceptive is the fact that translations are not unique and can be generated with greater or lesser bias depending on one's goal. Opposer's translation prepared by its own counsel goes beyond the reasonable in an effort to reach its goal.

Applicant should be allowed to provide a translation from a disinterested party to further the Opposition proceeding. With translations from each party and elaboration on the errors, the German original, and background, the Board will have evidence upon which to base a more just result.

### 3. OPPOSER'S DECEPTION AND DECEIT

Applicant need not point out the numerous incidents where Opposer's counsel misleads, misstates, and obfuscates the character and origin of Opposer's translation. Reference to Par. 11 of Opposer's Response in opposition to the present Motion will suffice. Opposer's counsel states that the German Honorary Consul was the translator

to insure “an accurate and unbiased translation of the document in question by a translator whose impartiality is guaranteed” (Opposer’s Response. Par.11). The statement blatantly disregards the fact that Opposer’s counsel picked the portions of the Asset Purchase Agreement to translate, translated those portions, and then had the translation, including the errors, certified by the Honorary Consul without a shred of editing.

For all the reasons given above, justice requires that Applicant be granted the right to have a translation prepared by a translator of its own choosing.

#### 4. NO VIOLATION OF PROTECTIVE ORDER

In Par. 33 of Opposer’s Response, Opposer’s Atty. Fiocchi improvidently claims that Applicant’s counsel violated the Protective Order by disclosure in Applicant’s Motion of protected material. Without ever identifying the material, he requests sanctions. The vagueness of the claim is sufficient grounds for denial. However, while a reply to the vague claim is difficult, with a degree of speculation, Applicant will try.

In reviewing Applicant’s Motion and brief, Applicant suspects Atty. Fiocchi is alluding to Applicant’s discussion on page 3 of the reservation clause in the Asset Purchase Agreement. The clause recognizes Applicant’s right to the designation LAVATEC, and invalidates Opposer’s claim to exclusivity.

Applicant has had in its possession as early as September 2010, before the Opposition was filed, a portion of the Asset Purchase Agreement containing the reservation clause, since the clause preserves Applicant’s long-standing rights to LAVATEC. The reservation clause therefore falls within several classes of documents that should not be designated as protected. See Protective Order, Section 2.

Furthermore, Applicant’s Atty. Baker brought the reservation clause to the attention of Opposer’s Atty. Fiocchi in September 2010. On September 30, 2010, Atty. Fiocchi responded to Atty. Baker thanking him (“which you so kindly brought to our attention”), and recited the reservation clause verbatim with no confidentiality designation. See Applicant’s Exhibit 7 attached, bottom paragraph.

Consequently, it is ironic and reprehensible for Atty. Fiocchi (1) to have designated the reservation clause protected as Opposer has done in its production of documents, (2) to now charge Applicant's counsel with violation of the Protective Order, and (3) to request sanctions.

### **CONCLUSION**

Applicant requests that the Opposer be ordered to cooperate, to follow the provisions of the Protective Order, Pars. 4 – 5, and to allow Applicant to obtain a translation of the Asset Purchase Agreement, or so much of the Agreement as Applicant desires, from a disinterested translator of Applicant's choice.

Respectfully requested  
LAVATEC, INC., Applicant

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### **CERTIFICATE SERVICE**

The undersigned hereby certifies that a copy of the foregoing

### **APPLICANT'S REPLY IN SUPPORT OF DOCUMENT RELEASE FOR TRANSLATION**

was sent by email and served by First Class U.S. Mail, postage prepaid this 2nd day of December 2011, to the following counsel of record:

Atty. Andrea Fiocchi  
Atty. Sarah E. Tallent  
44 Wall Street, 10<sup>th</sup> Fl  
New York, NY 10005

By     s/John C. Linderman  
John C. Linderman

ANDREA FIOCCHI  
ATTORNEY AT LAW  
AFIOCCHI@REINHARDT-LAW.COM

September 30, 2010

Via Email

Dean W. Baker, Esq.  
195 Church Street, Floor 8  
New Haven, CT 06510

Re: Your communication dated September 23, 2010

Dear Mr. Baker:

Reference is made to your email communication dated 09.23.2010 (the "Communication"), the content of which is hereby rejected in its entirety. Please find below our client's position on the allegations you made in the Communication.

As you stated, Lavatec, Inc. was at all times a mere distributor for Lavatec GmbH (f/k/a Lavatec AG). Lavatec, Inc. would have had no products to sell in the U.S. had Lavatec GmbH not sold them to Lavatec, Inc. in the U.S. in the first place. The company that first introduced Lavatec's products in the stream of commerce in the U.S. is, therefore, Lavatec GmbH.

Lavatec, Inc. is a wholly owned subsidiary of Lavatec GmbH. Before filing for Chapter XI, Lavatec, Inc. was always under the control of Mr. Tadros, the majority owner, who was President of both Lavatec, Inc. and Lavatec GmbH. Lavatec, Inc. was allowed to operate and sell products solely because Mr. Tadros permitted it to do so. It is not a coincidence that Lavatec, Inc. never registered or attempted to register the "LAVATEC" mark in the U.S. and never claimed it as one of its assets in the Chapter XI proceeding until September 21, 2010. Lavatec, Inc.'s ownership of the "LAVATEC" trademark was simply not contemplated. We are informed that the German receiver was also very surprised to learn that Lavatec, Inc. is attempting to register the mark "LAVATEC" without the parent company's approval.

In the Communication, you are confusing the right of Lavatec, Inc. to use the name Lavatec as part of its corporate denomination with the right of Lavatec, Inc. to commercialize products and services under the trade mark "LAVATEC". We had the provision of the German deed, which you so kindly brought to our attention, translated by a German attorney (i.e., "*Der Verkäufer 1 weist den Käufer darauf hin, dass kein ausschließliches Recht der Schuldnerin 1 an der Bezeichnung "Lavatec" besteht, sondern auch die Lavatec Inc., USA und Lavatec France das Recht haben, ihre jeweilige Firma zu führen*") and it appears that your translation or interpretation thereof is grossly inaccurate. We understand that the correct translation is as follows: