ESTTA Tracking number: **ESTTA849977**

Filing date: **10/04/2017**

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

Proceeding	87033933
Applicant	C G Asset Management Pty Ltd as trustee
Applied for Mark	THE SAISON D'HERETIQUE
Correspondence Address	ALEXANDER LAZOUSKI LAZOUSKI IP LLC 14726 BOWFIN TERRACE STE 1 LAKEWOOD RANCH, FL 34202 UNITED STATES Email: al@lzlawoffice.com
Submission	Reply Brief
Attachments	THE SAISON DHERETIQUE Reply Brief.pdf(220985 bytes)
Filer's Name	Alexander Lazouski
Filer's email	al@lzlawoffice.com
Signature	/as/
Date	10/04/2017

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

Applicant: C G Asset Management Pty Ltd as trustee for C G Asset Management Trust

Trademark: THE SAISON D'HERETIQUE

Serial No. 87033933

APPLICANT'S REPLY BRIEF

In accordance with 37 C.F.R. §2.142(b)(1) and TPEM §1501.02(c) Applicant submits this Reply Brief in reply to Examining Attorney's Appeal Brief ("EA Brief"). The purpose of this Reply Brief is to draw the Board's attention to some discrepancies in the Examining Attorney's Brief and that some of the evidence submitted by Examining Attorney should not be considered.

A Theory Of Foreign Equivalents Is Crucial In Order To Discern The Meaning Of Applicant's Mark

The Examining Attorney acknowledged that a theory of foreign equivalents applies in this case (p. 3 of Office action issued on September 15, 2016 and p. 2 of Office action issued on April 4, 2017). At the same time, the Examining Attorney states the following in his Brief:

> While "HERETIQUE" may be the French word for "HERETIC," the average consumer need not speak French in order to discern the meaning, as there is only a slight difference in sound and the spelling of the words is similar.
>
> pp. 3

This statement contradicts with the Examining Attorney's prior conclusions and is not supported by presented evidence. First, the last wording of Applicant's mark is not "HERETIQUE" by itself but "D'HERETIQUE". Therefore, it is logical to assume that in order to

descent the meaning of this wording an average consumer must be at least familiar with French grammar rules according to which “de” or “ d’ “ in French language is often used to show possession or belonging. As such, the Examining Attorney’s statement that the average consumer need not speak French in order to discern the meaning of the mark is incorrect. In fact, the crux of the issue is the meaning of THE SAISON D'HERETIQUE to French speakers. It is absolutely crucial for an ordinary American purchaser to “stop and translate” THE SAISON D'HERETIQUE as “the season of a heretic” in order to descent the meaning of the mark.

This type of discrepancy is also highlighted in the Examining Attorney’s position in regards to a term “SAISON”. Specifically, in a final Office Action issued on April 4, 2017 the Examining Attorney withdrew a disclaimer of “SAISON” agreeing with Applicant’s arguments that “SAISON” is not descriptive/generic in connection with Applicant’s goods. However, in the EA Brief the Examining Attorney again stated that “the wording “SAISON” in Applicant’s mark is highly descriptive of and/or generic for the Applicant’s goods, because SAISON is merely a type of beer or ale which is commonly produced, sold, and consumed in United States” (p. 4 of the Brief).

This position is clearly self-contradicting. First, this issue is moot because the Examining Attorney withdrew a disclaimer of “SAISON” and, therefore, agreed that “season” is not merely descriptive/generic. More importantly, as discussed in Applicant’s Brief, it is crucial for the instant analysis to recognize that an expression THE SAISON D'HERETIQUE is unitary and a double entendre. In a true double entendre there are no more or less significant parts by definition because prospective customers understand a double entendre by giving equal weight to all parts of the phrase. There was no dispute that the words of Applicant’s Mark are in French, or that the ordinary American purchaser would "stop and translate" the foreign term into its English

equivalent. If done so, the meaning of Applicant's mark is "the season of a heretic" which is very different from HERETIC BREWING COMPANY.

As the Examiner's Attorney's own evidence demonstrates, "saison" is French for "season". (Exhibit A in Applicant's Appeal Brief). In fact, Applicant's mark is not a separate word "SAISON" but is incorporated into a unitary expression "THE SAISON D'HERETIQUE". Therefore, the meaning of THE SAISON D'HERETIQUE to French speakers will be "the season of a heretic", not "a type of ale in combination with "heretic" in French" as suggested by the Examining Attorney. Prior submitted certificates of registrations for IT'S BIKINI SAISON, Reg. No. 5137612 for "Beer, ale, lager, stout, porter, shandy" and LA SAISON DES FÊTES (Translation: "THE FESTIVE SEASON"), Reg. No. 4563588 for "beer" (Exhibit C of Applicant's Brief) indicate that the Office rightfully recognizes that a double meaning of "saison" for beer-related products create a well-recognized double entendre. As such, THE SAISON D'HERETIQUE creates a clever juxtaposition that presents a distinctive meaning for the consumer which is vastly different from HERETIC BREWING COMPANY.

Additional Evidence submitted by the Examining Attorney

In its Brief the Examining Attorney provided additional evidence by stating that "Registrant also being the only registered owner of "HERETIC" formative marks for "beer" further supports this argument, to wit: RELEASE YOUR INNER HERETIC, U.S. Registration No. 4272690; I AM A HERETIC., U.S. Registration No. 4459441; and BE A HERETIC, U.S. Registration No. 4106514."

According to 37 CFR § 2.142(d) "[t]he record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice

of appeal." See *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (new evidence submitted with brief is "untimely and therefore not part of the record for this case"). Since this type of evidence/information was not submitted prior to Appeal, Applicant objects to admission of this evidence and pleads that it should not be considered by the Board.

Please direct any questions regarding this response to the undersigned attorneys for Applicant.

Respectfully submitted,

/alazouski/
Alexander S. Lazouski
Lazouski IP LLC
14726 Bowfin Terrace, Suite 1,
Lakewood Ranch, FL 34202
Attorney for Applicant
Phone: 201-645-5616