

This Opinion is not a  
Precedent of the TTAB

Hearing: July 9, 2014

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Delta Air Lines, Inc.*  
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Serial No. 85196441  
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David Landau, Mariana Paula Noli, Fred W. Meyers and Chloe A. Hecht of Ladas & Parry LLP, for Delta Air Lines, Inc.

Toby Ellen Bulloff, Trademark Examining Attorney, Law Office 119,  
Brett J. Golden, Managing Attorney.

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Before Bucher, Kuhlke and Adlin,  
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Delta Air Lines, Inc. (“Applicant”) seeks registration on the Principal Register of the mark **Atlanta’s Hometown Airline** (*in standard character format*) for the “transportation of goods, passengers and travellers by air” in International Class 39.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85196441 was filed on December 13, 2010, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant's mark so resembles the previously registered mark **CHICAGO'S HOMETOWN AIRLINE**<sup>2</sup> registered for "transportation of persons, property and mail by air," that use of Applicant's mark in connection with Applicant's services is likely to cause confusion, to cause mistake, or to deceive. In addition, while Applicant agreed to disclaim the word "Airline," the Trademark Examining Attorney has made final the requirement that Applicant also disclaim the word "Atlanta's."

When the refusals were made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for reconsideration, the appeal was resumed. Both Applicant and the Trademark Examining Attorney have fully briefed the issues. We affirm both refusals to register.

### **Preliminary Matter**

The Trademark Examining Attorney has objected to new evidence that Applicant submitted with its appeal brief, namely evidence that a number of third-party airlines refer to themselves as the "hometown airline" of different named cities. The record in an application should be complete prior to the filing of an

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<sup>2</sup> Registration No. 2804686 issued to United Airlines, Inc. on January 13, 2004; Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged. This registration issued under the provisions of Section 2(f), with Registrant claiming distinctiveness for the composite. No claim is made to the exclusive right to use the word "Airline" apart from the mark as shown.

appeal. 37 C.F.R. § 2.142(d); TBMP §§ 1203.02(e), 1207.01. Because this new evidence was untimely submitted during the appeal, we have not considered it. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011); *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n.32, 1769 (TTAB 2011).

### **Likelihood of Confusion Analysis**

Our determination under Section 2(d) is based upon an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also*, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We discuss each of the *du Pont* factors concerning which Applicant or the Trademark Examining Attorney submitted argument or evidence.

#### **A. Relationship of the Services and Channels of Trade**

The Trademark Examining Attorney contends that Applicant’s services are legally identical to those of Registrant. In fact, the evidence shows that they are and

Applicant does not argue otherwise. Accordingly, the second and third *du Pont* factors strongly favor a finding of likelihood of confusion.

B. The conditions under which and buyers to whom sales are made

As to whether consumers of airline passenger transportation services are sophisticated and knowledgeable, Applicant's counsel argues that purchasers of airline tickets "are generally intelligent [and] savvy," and given the requisite investment of time and money, the details of each such purchase will be planned, discussed and "investigated in detail." However, we find no evidence in this record supporting a conclusion that airline passengers, as a class, are sophisticated consumers. Accordingly, we find this to be a neutral *du Pont* factor.

C. The Similarity of the Marks

We turn then to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of "the marks in their entirety as to appearance, sound, connotation, and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). We also keep in mind that when, as here, marks would be used in connection with identical services, "the degree of similarity necessary to support a

conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

Applicant argues that because these taglines will each be used in connection with the owner’s house mark (e.g., “United: Chicago’s Hometown Airline” or “Delta: Atlanta’s Hometown Airline”), it is highly unlikely that the respective marks will be confused. However, neither Registrant’s nor Applicant’s drawing includes its house mark/airline name, and therefore neither Registrant nor Applicant would be required to use their slogans in this restrictive manner.

Registrant’s mark is simply **CHICAGO’S HOMETOWN AIRLINE**, and Applicant’s mark is **Atlanta’s Hometown Airline**. Applicant argues that inasmuch as the initial words in the marks do not look alike or sound alike, the marks are readily distinguishable. While we agree with Applicant that these city names neither sound alike nor do they look alike, that is not the end of our inquiry – especially where Applicant and Registrant fly in and out of many cities in addition to Chicago and Atlanta.

As applicant also points out, the respective marks must be considered in their entirety – not dissected or split into component parts and each part compared with other parts. It is the impression created by the involved marks – each considered as a whole – that is important. *See Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Accordingly, even where marks may have dissimilarities as to their appearance and sound, they may still be confusingly similar if they convey the same idea, create the same mental imagery, or have the

same overall connotation. *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970) (holding **MISTER STAIN** likely to be confused with **MR. CLEAN** on competing cleaning products); see *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125 (TTAB 1978) (holding **TUNA O' THE FARM** for canned chicken likely to be confused with **CHICKEN OF THE SEA** for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105 (TTAB 1973) (holding **UPTOWNER** for hotel and restaurant services likely to be confused with **DOWNTOWNER** for substantially identical services).

Here, the structure of Registrant's cited mark is identical to that of Applicant's applied-for mark. The first word of each is the possessive form of a major United States city. This is followed by the identical phraseology, "Hometown Airline."

Nonetheless, Applicant argues that purchasers will be inclined to focus on the first words of each of these marks, namely "Chicago" and "Atlanta." Applicant is correct in pointing out that these two U.S. cities are quite different in many respects. However, the crux of the issue before us is not whether Chicagoans or Atlantans or even United States consumers in general are likely to confuse the city of Chicago with the city of Atlanta. Rather, the question is whether the *sources* of the respective airline passenger services doing business under these similar taglines are likely be confused.

The term "Airline" is clearly generic for air transportation services and has no source indicating capability. Applicant has correctly disclaimed this term, and does not argue otherwise.

However, Applicant takes the position that the terminology, “Hometown Airline,” shared by these two marks is inherently weak. As discussed below, when we focus on the number and nature of similar marks in use, we find that not to be the case as applied to the relevant services. Applicant argues “competitive need” in support of its position on the weakness of this term, namely, that as a matter of competitive fairness, Registrant is not entitled to a monopoly on the tagline, “Hometown Airline.” Inasmuch as Applicant’s mark identifies a different city in a different geographic region of the country, Applicant argues that these two marks should be able peacefully to coexist. By contrast, the Trademark Examining Attorney treats the ending terminology, “Hometown Airline,” within the larger phrase “\_\_\_\_\_’s Hometown Airline,” as an advertising tagline having source-indicating capability apart from the city named.

Based upon the dictionary definition of the word “hometown” that Applicant has submitted for the record, when used in connection with individuals, the meaning points to the location where one was born or lived during one’s formative years. For an entity, it is the location of either its present or historic headquarters. Applicant looks at “hometown” from the standpoint of the airline, and argues that an airline can have headquarters in only one location, its “hometown.” Hence, Applicant takes the position that as soon as the allegedly weak term, “Hometown Airline,” is paired with two very distinct cities, Registrant’s and Applicant’s composite phrases serve to distinguish the services of United Airlines (Registrant, with its home in Chicago) from the services of Delta Air Lines (Applicant, with its home in Atlanta).

In assessing the overall connotations presented by two dissimilar marks, we must determine how the individual components within a composite mark function together to create a particular commercial impression. In the face of continued airline industry mergers in an already concentrated market, we cannot be sure that consumers make a factual connection between a named airline and, for example, the city name of that airline's historic headquarters. In this context, as noted above, this record does not support a finding that airline passengers as a class are "sophisticated" consumers. Based upon the whole of this record, we cannot be sure that airline passengers know or care, for example, that United is headquartered in Chicago, Delta in Atlanta, American in Fort Worth and Southwest in Dallas. Hence, we agree with the Trademark Examining Attorney that the respective marks, despite their different cities, could well create for prospective consumers the impression that a single anonymous source had chosen the same laudatory or nostalgic tagline for multiple cities.

While not necessary to our determination herein, we also find that in the context of these marks, the term "hometown" could well be seen as referring to the hometown of the airline customers who live in the named city. In the event that the referenced airline with a hub-and-spoke model has a hub airport in a major city where it is the dominant carrier, then arguably that airline could be seen as the "hometown airline" for customers residing in that city. With this interpretation, a single airline could have a number of "hometowns" spread around the country.

In assessing the similarities of the marks, we agree with the Trademark Examining Attorney that despite the difference in city names, these two marks



create substantially the same connotations and commercial impressions, and hence, we find that this critical first *du Pont* factor supports a conclusion that confusion is likely.

**D. The number and nature of similar marks in use on similar services**

Applicant argues that the cited mark is a weak mark entitled to a narrow scope of protection. Applicant argues that the cited mark is made up of “descriptive and common terms” and therefore it is not entitled to the broad scope of protection accorded it by the Trademark Examining Attorney.

As support for this position, Applicant has shown that the term “Hometown” alone is used in composite marks in registrations covering services in a variety of industries, of which the following are representative examples:

<b><i>Banking Services:</i></b>		
<b>YOUR HOMETOWN BANK<sup>3</sup></b>	<b>HOMETOWN HELPFUL<sup>4</sup></b>	<b>HOMETOWN BANKING<sup>5</sup></b>
<b>YOUR HOMETOWN ADVANTAGE<sup>6</sup></b>	<b>CHICAGOLAND’S HOMETOWN BANK<sup>7</sup></b>	<b>HOMETOWN HEROES<sup>8</sup></b>

<sup>3</sup> Registration No. 1414498 issued on October 21, 1986; renewed. Owned by Graystone Tower Bank of Lancaster, PA. No claim is made to the exclusive right to use the word “Bank” apart from the mark as shown.

<sup>4</sup> Registration No. 2226251 issued on February 23, 1999; renewed. Owned by Sterling Savings Bank of Spokane, WA.

<sup>5</sup> Registration No. 2651172 issued on November 19, 2002; renewed. Owned by TNBank of Oak Ridge, TN. No claim is made to the exclusive right to use the word “Banking” apart from the mark as shown.

<sup>6</sup> Registration No. 2819440 issued on March 2, 2004; renewed. Owned by United Bank of Atmore, AL.

<sup>7</sup> Registration No. 3818740 issued on July 13, 2010. Owned by Wintrust Financial Corporation of Lake Forest, IL. No claim is made to the exclusive right to use the words “Chicagoland’s” or “Bank” apart from the mark as shown.

<sup>8</sup> Registration No. 4001385 issued on July 26, 2011. Owned by First Reliance Bank of Florence, SC.

<b><i>Newspaper Services:</i></b>		
<b>AMERICAN HOMETOWN PUBLISHING<sup>9</sup></b>	<b>NEW YORK'S HOMETOWN NEWSPAPER<sup>10</sup></b>	<b>AMERICAN HOMETOWN MEDIA<sup>11</sup></b>
<b><i>Grocery Store Services:</i></b>		
<b>HOMETOWN PROUD<sup>12</sup></b>	<b>HOMETOWN HEROES<sup>13</sup></b>	<b>HOMETOWN FRIENDLY<sup>14</sup></b>
<b>HOMETOWN FRESH<sup>15</sup></b>	<b>“Your Hometown Grocery Store”<sup>16</sup></b>	<b>Your Arizona Hometown grocer<sup>17</sup></b>

We do not find these third-party registrations to be especially relevant. The weakness of a particular cited mark is generally determined in the context of the number and nature of similar marks *in use in the marketplace* in connection with

<sup>9</sup> Registration No. 2960465 issued on June 7, 2005. Owned by American Hometown Publishing, Inc. of Franklin, TN. No claim is made to the exclusive right to use the words “American” or “Publishing” apart from the mark as shown.

<sup>10</sup> Registration No. 4093176 issued on January 31, 2012. Owned by Daily News, L.P. of New York, NY. No claim is made to the exclusive right to use the words “New York’s” or “Newspaper” apart from the mark as shown.

<sup>11</sup> Registration No. 4292876 issued on February 19, 2013. Owned by American Hometown Media, Inc. of Franklin, TN. No claim is made to the exclusive right to use the words “American” or “Media” apart from the mark as shown. This appears to be owned by the same entity associated with Registration No. 2960465, *supra*.

<sup>12</sup> Registration No. 1824727 issued on March 1, 1994; renewed. Owned by IGA, Inc. of Chicago, IL.

<sup>13</sup> Registration No. 3877908 issued on November 16, 2010. Owned by Unified Grocers, Inc. of Commerce, CA.

<sup>14</sup> Registration No. 3881228 issued on November 23, 2010. Owned by Unified Grocers, Inc. of Commerce, CA.

<sup>15</sup> Registration No. 3881229 issued on November 23, 2010. Owned by Unified Grocers, Inc. of Commerce, CA. We note that these three registrations are owned by the same party.

<sup>16</sup> Registration No. 3027836 issued on December 13, 2005. Owned by Eureka Discount Foods, Inc. of Kirkwood, MO. No claim is made to the exclusive right to use the term “Grocery Store” apart from the mark as shown.

<sup>17</sup> Registration No. 3993185 issued on July 12, 2011. Owned by Bashas’ Inc. of Chandler, AZ. No claim is made to the exclusive right to use the words “Arizona” or “Grocer” apart from the mark as shown.

*similar* goods and/or services. See *Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991). In this context, we note that Registrant's cited mark is the only one on the federal trademark register that has this "\_\_\_\_\_'s Hometown Airline" tagline registered in connection with these services.

We do note that inasmuch as the cited mark registered under Section 2(f) of the Trademark Act, this is a concession that this mark was merely descriptive of the recited services, at least at the time of application. 15 U.S.C. § 1052(f); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1571, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). Although the cited mark (at least at the time of adoption) was not as strong as would be a totally arbitrary or coined term, we agree with the Trademark Examining Attorney that it is nonetheless currently entitled to protection against the registration by a subsequent user of a highly-similar mark for closely-related services. *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982); see *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

In support of its position, Applicant points to *In re Hartz Hotel Services, Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012), where the Board found that **GRAND HOTEL NYC** was not confusingly similar to the cited mark **GRAND HOTEL**. Of course, in addition to describing that cited mark in its entirety as being "highly suggestive," the Board reviewed evidence in the file demonstrating multiple third-party registrations, third-party websites, and a declaration containing the result of an investigator's telephone contacts with third-party hotels using the word "Grand" in

their name. With all this evidence, the Board concluded that in the case of the term “Grand Hotel,” the addition of a geographic location created sufficient distinctions to avoid confusion. That panel noted that evidently “the owner of the cited registration did not have a problem with the registration of these third-party marks, as they all issued after the registration of the cited registrant's registration without challenge by the registrant.” *Id.*

Similar to the term “Grand Hotel,” we reviewed above third-party registrations having marks incorporating the word “Hometown” within the fields of newspapers, grocery markets and banking. Like frequent third-party uses of “Grand Hotel,” these registrations point to factual situations where, for example, similar banking services are offered nationwide by an extremely large number of small “hometown” banks (viz., **YOUR HOMETOWN ADVANTAGE** banking services offered by the United Bank of Atmore, AL). By contrast, the record in this case portrays a mere handful of major domestic airlines.

As to the overall strength of the cited mark, we find no probative evidence in Applicant’s allegation that the cited mark coexisted on the register for several years with a now-cancelled registration for **LAS VEGAS’ HOMETOWN AIRLINE**. A cancelled or expired registration is not evidence that the mark listed therein is currently in use in the marketplace; it is evidence only that the registration once issued. *See In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006); *Time Warner Entm’t Co. v. Jones*, 65 USPQ2d 1650, 1654 n.6 (TTAB 2002); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1048 n.2 (TTAB 2002); *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1746-47 (TTAB 1987); TBMP

§ 704.03(b)(1)(A) (2014). Furthermore, we are not bound to approve for registration an Applicant's mark based solely upon the registration of other assertedly similar marks for other goods or services based on unique evidentiary records. *See In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Datapipe, Inc.*, 111 USPQ2d 1330 (TTAB 2014). In any event, in spite of Applicant's repeated arguments that the term "hometown airline" is prevalent in the airline industry, we find that the record does not support this conclusion.

Hence, we find this to be a neutral *du Pont* factor.

E. Determination on Likelihood of Confusion

With legally identical services that are presumed to travel through the same trade channels to the same classes of ordinary consumers, and where the respective marks are structured identically – the first word of each being the possessive form of a major U.S. city, followed by the identical phraseology, "Hometown Airline," we find a likelihood of confusion should Applicant's applied-for mark be used in connection with Applicant's services.

**Disclaimer**

The Trademark Examining Attorney has taken the position that Applicant must disclaim the geographically descriptive wording "Atlanta's" (as well as the descriptive wording "Airline") apart from the mark as shown because it merely describes the location of Applicant's headquarters in Atlanta, GA, and the air transportation services performed by the airline. *See* 15 U.S.C. §§ 1052(e)(1), 1056(a); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103

USPQ2d 1753, 1755 (Fed. Cir. 2012) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005). She argues that Atlanta is a generally known geographic location, and Applicant's website shows that the involved services originate in this city. We agree that absent a showing of acquired distinctiveness for the entire composite mark,<sup>18</sup> "Atlanta's" is a geographically descriptive term and must be disclaimed along with the generic term "Airline."<sup>19</sup> An appropriately-worded disclaimer would read as follows: "No claim is made to the exclusive right to use the words 'Atlanta's' or 'Airline' apart from the mark as shown."

*Decision:* Both refusals to register Applicant's mark **Atlanta's Hometown Airline** are hereby affirmed.

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<sup>18</sup> This was the case in the cited registration, for example, which issued under the provisions of Section 2(f) of the Lanham Act. With Registrant claiming distinctiveness for the entire composite, it made unnecessary a disclaimer of the word "Chicago's."

<sup>19</sup> Finally, we note that this requirement fits well the pattern of disclaimers seen in third-party registrations placed into the record by Applicant, *supra*, such as **CHICAGOLAND'S HOMETOWN BANK**, **AMERICAN HOMETOWN PUBLISHING**, **NEW YORK'S HOMETOWN NEWSPAPER**, **AMERICAN HOMETOWN MEDIA**, and **Your Arizona Hometown grocer**. In each of these cases, the leading geographical term and the trailing generic term for the services are separately disclaimed while the intervening word, "Hometown," remains in each as the element of the combined term providing a requisite measure of distinctiveness to carry the composite mark to registration.