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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applied for Mark	DAVINCI JETS
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of DAVINCI JETS LLC

Serial No. 86761260

Trademark: DAVINCI JETS

Filing Date: September 18, 2015

BRIEF OF THE APPLICANT

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I. INTRODUCTION

COMES NOW the Applicant DAVINCI JETS LLC (hereinafter “Applicant”) provides this Brief of the Applicant in support of its appeal of the examining attorney’s refusal to register the instant mark.

II. STATEMENT OF THE CASE

On or about September 18, 2015 Applicant filed the instant trademark with the U.S. Patent and Trademark Office seeking to register the same on in connection with the following services: Chartering of jets .

On or about January 11, 2016 the Examining Attorney refused registration of the Applicant’s trademark on the grounds that, if registered, it would create a likelihood of confusion with the registered trademark DA VINCI TOUR more fully set forth in U.S. Registration No. 3906871.

On or about April 1, 2016 Applicant filed a response to the Office Action dated January 11, 2016 arguing in support of registration. However, ultimately Applicant’s argument was not deemed persuasive by the Examining Attorney and, accordingly, on or about April 23, 2016 the Examining Attorney made the refusal final.

The instant appeal now timely follows.

III. ARGUMENT

The Standard for a Determination of a Likelihood of Confusion

A determination of likelihood of confusion between marks is made on a case- specific basis. *In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533 (Fed . Cir. 1997). The Examining Attorney is to apply each of the applicable factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) The similarity or dissimilarity and nature of the goods as described in an application or registration or in connection with which a prior mark is in use;
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) The conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing;
- (5) The number and nature of similar marks in use on similar services; and
- (6) The absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

Id.

The Examining Attorney is tasked with evaluating the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the Examining Attorney must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10th Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(citing *Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531, 30 USPQ2d 1930 (10th Cir. 1994)). Even the use of identical dominant words or terms does not automatically mean that two marks are confusingly similar. In *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that “Oatmeal Raisin Crisp” and “Apple Raisin Crisp” are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10th Cir. 1996), marks for “FirstBank” and for “First Bank Kansas” were found not

to be confusingly similar. Further, in *Luigino's Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark “Lean Cuisine” was not confusingly similar to “Michelina’s Lean ‘N Tasty” even though both marks use the word “Lean” and are in the same class of services, namely, low-fat frozen food.

Concerning the respective goods with which the marks are used, the nature and scope of a party’s goods must be determined on the basis of the goods recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston ComputergoodsInc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). *See generally* TMEP § 1207.01(a)(iii).

Even if the marks are similar, confusion is not likely to occur if the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create an incorrect assumption that they originate from the same source. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986) (QR for coaxial cable held

not confusingly similar to QR for various products (*e.g.*, lamps, tubes) related to the photocopying field). *See generally* TMEP § 1207.01(a)(i).

Purchasers who are sophisticated or knowledgeable in a particular field are not necessarily immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. *See generally* TMEP § 1207.01(d)(vii).

Applying the legal standards as enumerated above, it is clear that confusion is not likely as between Applicant's trademark and the trademark cited and, accordingly, the refusal to register DAVINCI JETS should be withdrawn.

The Trademarks Are Dissimilar

The points of comparison for a word mark are appearance, sound, meaning, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973)). Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related. Rather, taking into account all of the relevant facts of a particular case, similarity as to one factor alone *may* be sufficient to support a holding that the marks are confusingly similar, but a similarity of one factor is not dispositive of the entire analysis. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Additions or deletions to marks are often sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) the matter

common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.

Different Commercial Impressions

If the respective trademarks create separate and distinct commercial impressions source confusion is not likely. *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of THE RITZ KIDS for clothing items (including gloves) and RITZ for various kitchen textiles (including barbeque mitts) is likely to cause confusion, because, *inter alia*, THE RITZ KIDS creates a different commercial impression).

In the instant case, Applicant's trademark DAVINCI JETS creates a commercial impression of turnkey aircraft management for only chartered jets . In the alternative, the registered trademark DA VINCI TOUR creates a commercial impression of basic entry level tour company that focuses on buses and cruises for families and organizations and not high level executives that would want to charter a jet . Given these separate and distinct commercial impressions, it is submitted that this fact favors a finding of an absence of a likelihood of confusion under this *du Pont Factor*.

The Trademarks Create Distinct Connotations

Similarity in meaning or connotation is another factor in determining whether the marks are confusingly similar. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973); *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645-46 (TTAB 2009). The focus is on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks.

Moreover, the meaning or connotation of a mark must be determined in relation to the named goods or services. Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion. *See, e.g., In re Sears, Roebuck & Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987) (holding CROSS-OVER for bras and CROSSOVER for ladies' sportswear not likely to cause confusion, noting that the term "CROSS-OVER" was suggestive of the construction of applicant's bras, whereas "CROSSOVER," as applied to registrant's goods, was "likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which "crosses over" the line between informal and more formal wear . . . or the line between two seasons"); *In re British Bulldog, Ltd.*, 224 USPQ 854, 856 (TTAB 1984) (holding PLAYERS for men's underwear and PLAYERS for shoes not likely to cause confusion, agreeing with applicant's argument that the term "PLAYERS" implies a fit, style, color, and durability suitable for outdoor activities when applied to shoes, but "implies something else, primarily indoors in nature" when applied to men's underwear); *In re Sydel Lingerie Co.*, 197 USPQ 629, 630 (TTAB 1977) (holding BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's clothing not likely to cause confusion, noting that the wording connotes the drinking phrase "Drink Up" when applied to men's clothing, but does not have this connotation when applied to ladies' and children's underwear); *In re Farm Fresh Catfish Co.*, 231 USPQ 495, 495-96 (TTAB 1986) (holding CATFISH BOBBERS (with "CATFISH" disclaimed) for fish, and BOBBER for restaurant services, not likely to cause confusion, because the word "BOBBER" has different connotation when used in connection with the respective goods and services); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (affirming

TTAB's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services, and opposer's CITIBANK marks for banking and financial services, is not likely cause confusion, based, in part, on findings that the phrase "City Bank" is frequently used in the banking industry and that "CAPITAL" is the dominant element of applicant's marks, which gives the marks a geographic connotation as well as a look and sound distinct from opposer's marks).

Applying the above to the application at hand, Applicant applied to register the trademark DAVINCI JETS in connection with Chartering of jets . In this context, Applicant's trademark creates a connotation of turnkey aircraft management and chartered jet flight service.

In contrast, the registered trademark is DA VINCI TOUR used in connection with transport, namely, air transport, car transport, train transport, boat transport, taxi, passengers transport; packaging for transport and storage of goods; travel and excursion arrangement; delivery of newspapers; physical storage of electronically stored data or documents; booking of seats for travel; escorting of travelers; travel agencies services, namely, making reservations and bookings for transportation, transport of passengers; organizing and conducting of sightseeing tours of cultural areas and monuments; transportation reservation services; electronic storage of computerized commercial information; travel and tour information service . In this context, the registered trademark creates a connotation of touring all places of Di Vinci Code .

Accordingly, as the trademarks at issue create distinct connotations in relation to their respective goods or services, it is respectfully submitted that this also favors a finding of an absence of a likelihood of confusion as it relates to this *du Pont* factor.

Distinctions as Between Applicant's and Registrant's Goods and Services

The nature and scope the goods or services offered in connection with the Applicant's and the registrant's trademarks must be determined on the basis of the goods or services identified in the application or registration. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 sF.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010).

The issue is not whether the goods and/or services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting "there is nothing in the record to suggest that a purchaser

of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source” though both were offered under the COACH mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB’s holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties’ respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by).

The facts in each case vary and the weight to be given each relevant *du Pont* factor may be different in light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Info. Res. Inc. v. X*Press Info. Servs.*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171–72 (TTAB 1987) (regarding food products); *In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985) (regarding computer hardware and software); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984)

(regarding clothing); *see also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947–48 (Fed. Cir. 2006) (noting that relatedness between software-related goods may not be presumed merely because the goods are delivered in the same media format and that, instead, a subject-matter-based mode of analysis is appropriate).

In the instant matter, Applicant provides the following identification in the subject application: Chartering of jets . To the contrary, the registered trademark provides the following: transport, namely, air transport, car transport, train transport, boat transport, taxi, passengers transport; packaging for transport and storage of goods; travel and excursion arrangement; delivery of newspapers; physical storage of electronically stored data or documents; booking of seats for travel; escorting of travelers; travel agencies services, namely, making reservations and bookings for transportation, transport of passengers; organizing and conducting of sightseeing tours of cultural areas and monuments; transportation reservation services; electronic storage of computerized commercial information; travel and tour information service . Within this context, these differ insofar as the blocking trademark provides tours specifically related to all places of the Da Vinci Code, whereas applicant's mark provides turnkey aircraft management and chartering of jets for high level businesses and executives .

As such, and in consideration of these distinctions, it is respectfully submitted that the instant *du Pont* factor favors registration of the applied-for trademark.

Distinctions Between Trade Channels

The Applicant's services travel in separate and distinct channels of trade apart from the registered trademark's services. Applicant's trademark reaches the end consumer by and through marketing partnerships with fortune 500 companies and through sponsorship's, website promotions and corporate referrals and with the support of a full service advertising agency. In

contrast, the registered trademark appears to reach its end consumers by and through leveraging the popular movie, the da vinci code and through referrals. In this regard, there is no overlap as between the channels of trade of the Applicant as they pertain to the Applicant's Trademark and those of the registrant as they pertain to the cited registration.

Accordingly, it is respectfully submitted that this factor as well favors a finding of an absence of a likelihood of confusion under *du Pont*.

Distinctions Between Marketing Channels

The Applicant's services are marketed in a different manner apart from the marketing of the registered trademark's services. Applicant's trademark is marketed by and through marketing partnerships with fortune 500 companies and through sponsorship's, website promotions and corporate referrals and with the support of a full service advertising agency. In contrast, the registered trademark appears to market its services by and through fans and supporters of the da vinci code the movie. In this regard, there is no overlap as between the marketing of the Applicant and the registrant as they pertain to the respective trademarks.

Accordingly, it is respectfully submitted that this factor as well favors a finding of an absence of a likelihood of confusion under *du Pont*.

Sophistication of Purchasers

Circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1380, 1383 (TTAB 2006).

In the instant case, Applicant provides Chartering of jets . Registrant provides transport, namely, air transport, car transport, train transport, boat transport, taxi, passengers transport; packaging for transport and storage of goods; travel and excursion arrangement; delivery of newspapers; physical storage of electronically stored data or documents; booking of seats for travel; escorting of travelers; travel agencies services, namely, making reservations and bookings for transportation, transport of passengers; organizing and conducting of sightseeing tours of cultural areas and monuments; transportation reservation services; electronic storage of computerized commercial information; travel and tour information service . Traditionally, consumers of these goods are sophisticated insofar as the applicant's consumers are high level, wealthy, well educated executives and clearly informed of the services they are seeking, whereas the blocking mark's audience is not sophisticated because they are working off of the popularity of the movie to drive attention to their tour company.

As such, consumers exercise sufficient care in the purchase of the respective goods or services that clearly would minimize any potential for a likelihood of confusion as between the respective trademarks. As such, the *du Pont* factor also favors a finding of an absence of a likelihood of confusion.

Absence of Actual Confusion

Finally, there is no evidence of record indicating that there has been actual confusion in the marketplace as between Applicant's services and the registrant's services.

The absence of any instances of actual confusion is a meaningful factor where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or all

affected trademark owners. *See Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

As the Examining Attorney has alleged, the Office believes that the Applicant's services and those of the registered trademark travel in similar trade channels and are marketed in a similar enough manner to create a likelihood of confusion. While not conceding this point, provided that this is, in fact, the Office's position it would be contradictory to discount the absence of actual confusion as between the trademarks at issue where the Office contends there is an overlap in marketing and trade channels.

Accordingly, consistency in the Office's position, whether or not countered by the Applicant in the instant Argument, suggests that the Office should consider the absence of evidence of actual confusion to be a meaningful factor in the instant analysis, a factor which clearly supports registration of Applicant's Trademark under this *du Pont* factor.

CONCLUSION

Based upon the foregoing it is submitted that the *du Pont* factors addressed herein favor registration of the Applicant's Trademark.

WHEREFORE it is respectfully requested that the Trademark Trial and Appeal Board reverse the decision of the Examining Attorney, remove as an impediment the cited trademark, and approve the instant Application for publication.