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

Proceeding	91201830
Party	Plaintiff The Corps Group
Correspondence Address	J KEVIN FEE MORGAN LEWIS & BOCKIUS LLP 1111 PENNSYLVANIA AVE NW WASHINGTON, DC 20004 UNITED STATES melkon@laborlawyers.com, jrubel@morganlewis.com, jkfee@morganlewis.com, trademark@morganlewis.com
Submission	Other Motions/Papers
Filer's Name	J. Kevin Fee
Filer's e-mail	jkfee@morganlewis.com, jrubel@morganlewis.com, trademark@morganlewis.com
Signature	/jkf/
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Attachments	Notice of Completion of State Court Litigation.pdf(97682 bytes )

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

THE CORPS GROUP,

Opposer,

v.

AFTERBURNER, INC.

Applicant.

In re Application Serial No. 85/094,889  
Mark: Pilot Flight Suit Design



Published: August 30, 2011  
Opposition No. 91201830

**NOTICE OF COMPLETION OF STATE COURT LITIGATION**

Pursuant to the Board's June 9, 2016 notice, Opposer The Corps Group hereby notifies the Board that the state court litigation upon which the Board based its decision to stay this proceeding is now complete. A trial was held in March and April of 2014. The Corps Group filed an appeal, which was ruled on by the Georgia Court of Appeals in November 2015. Afterburner sought certiorari for review of the Court of Appeal's decision by the Georgia Supreme Court, which the Georgia Supreme Court denied on May 9, 2016.

During the trial, the court held that the flight suit that is the subject of this proceeding was generic. On page 23 of the attached excerpt from the trial transcript, the court refers to an application or a service mark registration with the USPTO that was filed in July 2010. This is a reference to Application Serial No. 85/094,889, which is the subject of this proceeding. On page 33, the court granted a directed verdict in favor of The Corps Group with respect to Afterburner's claim that The Corps Group infringed Afterburner's rights in the flight suit that is the subject of Application Serial No. 85/094,889 after holding that the flight suit was generic. Afterburner did not appeal the court's holding on this issue.

As a result of the court's decision, Opposer respectfully submits that the issue of the registrability of Applicant's purported service mark has been decided and the Board should refuse to register the mark.

Dated: July 11, 2016

Respectfully submitted,

By: /s/ J. Kevin Fee  
J. Kevin Fee  
Jordana S. Rubel  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
Tel: (202) 739-3000  
Fax: (202) 739-3001

Attorneys for Opposer  
The Corps Group

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Completion of State Court  
Litigation has been sent via email and first class mail, postage pre-paid, this 11th day of July,  
2016 to:

Michael C. Mason  
Essentia Legal PC  
Arrington Odula Owoo & Mason  
3915 Cascade Road, SW  
Suite 205  
Atlanta, GA 30331-8519  
michael@essentialegal.com

/s/ Jordana S. Rubel  
\_\_\_\_\_  
Jordana S. Rubel

IN THE SUPERIOR COURT OF FORSYTH COUNTY

STATE OF GEORGIA

AFTERBURNER, INC.,                    )  
  )  
    PLAINTIFF,                         )  
  )  
vs.                                     ) CASE NO: 09CV-2844  
  )  
THE CORPS GROUP, et al., ) EXCERPT  
  )  
    DEFENDANTS.                        )

EXCERPT OF DIRECTED VERDICT MOTIONS & RULINGS  
HEARD BEFORE HONORABLE JEFFREY BAGLEY, JUDGE  
ON APRIL 1, 2014  
AT THE FORSYTH COUNTY COURTHOUSE, CUMMING, GEORGIA

APPEARANCES:

STEPHEN DORVEE, ESQUIRE  
THERESA KANANEN, ESQUIRE  
LAUREN GREGORY, ESQUIRE  
ATTORNEYS AT LAW  
ATLANTA, GEORGIA

FOR THE PLAINTIFF

WALTER KRUGER, III, ESQUIRE  
MICHAEL ELKON, ESQUIRE  
TRACY MOON, ESQUIRE  
ATTORNEYS AT LAW  
ATLANTA, GEORGIA

FOR THE DEFENDANTS

KAYLA PETERS, RPR, CCR  
APPALACHIAN COURT REPORTING  
POST OFFICE BOX 943  
BLAIRSVILLE, GEORGIA 30514  
(706) 745-4455

1       there's enough evidence here that a jury, I believe, could  
2       come to the conclusion that maybe these actions were --  
3       could be classified as reckless. This is -- I don't think  
4       this is a black and white issue here. I think there's  
5       enough evidence to send the FLSA claims to the jury, and  
6       motion for directed verdict is denied as to the FLSA  
7       claims. That will go to the jury.

8       . . . . .

9       THE COURT: All right, Counsel. So, Counsel, whenever  
10      you're ready, I think you had another motion.

11      MR. KRUGER: Oh, thank you, sir. I'm sorry. That's  
12      why I asked to help me remember. Thank you, sir. Yes,  
13      sir. We would renew to preserve our arguments about  
14      directed verdict so -- let me think. We talked about the  
15      trademark and the trade dress claims, which I think are  
16      primarily all the claims that are left. Conspiracy, that  
17      kind of thing, I think they all rely on trademark and trade  
18      dress claims.

19      And so I don't want to repeat the arguments, but if  
20      it's okay with the Court, I'll just say we would renew --  
21      based upon the arguments earlier that we made, that we'd  
22      ask for directed verdict on the remaining claims that the  
23      plaintiffs have against us, and that's all I want to say.

24      THE COURT: Counsel.

25      MR. DORVEE: Very briefly, your Honor. I don't know

1 where this is an issue to go to the jury. Nothing's  
2 changed in terms of the evidence, therefore, we request  
3 that their motion be denied. While we're at it, we renew  
4 our motion for directed verdict as well just for purposes  
5 of the record.

6 THE COURT: Considering the defendants' motion for  
7 directed verdict, I believe there is sufficient evidence to  
8 send to the jury of the -- let's see. I believe there's --  
9 I have to look at the evidence. There's a registered mark  
10 for flawless execution that's in the evidence. There's a  
11 registered mark for task saturation. That's in the  
12 evidence.

13 MR. DORVEE: Correct.

14 THE COURT: That's in the evidence. And there's a  
15 registered mark, but it hasn't been registered in  
16 sufficient time to be incontestable for the symbol, "plan,  
17 brief, execute, debrief, win," with the circular arrows.

18 MR. DORVEE: Correct.

19 THE COURT: So the motion for directed verdict is  
20 denied as to those three registered marks that the  
21 claims -- the infringement claims on those three registered  
22 marks. As far as the common law, the evidence on common  
23 law marks, I think that they laid themselves a claim that  
24 they have a -- they have a claim to a mark, even though  
25 it's not registered, of the words, "plan, brief, execute,

1       debrief, win, lessons learned."

2               So, Mr. Dorvee, what -- is that -- you're claiming  
3       that also as a claimed mark?

4               MR. DORVEE:  Yes, your Honor.  There were --

5               THE COURT:  Stand up when you're talking.

6               MR. DORVEE:  Yes, your Honor.  There were documents  
7       admitted.

8               THE COURT:  What about execution rhythm?

9               MR. DORVEE:  Yes, your Honor.

10              THE COURT:  You're also claiming that as a common law  
11       mark?

12              MR. DORVEE:  Yes.

13              THE COURT:  What about plan, dot, brief, dot, execute,  
14       dot, debrief equals win?

15              MR. DORVEE:  We're not claiming that anymore.  I don't  
16       believe it's in the documents.

17              THE COURT:  Well, it was in -- we had that down, so  
18       I'm going to grant a directed verdict as to that particular  
19       one.  All right.  So what we have then are the  
20       registered -- those three registered marks that are being  
21       sought or claimed that there was a claim of infringement on  
22       and the two common law marks that there's a claim of  
23       infringement on, the "plan, brief, execute, debrief, win  
24       lessons learned" and the "execution rhythm."

25              MR. DORVEE:  Correct.



1 THE COURT: That's what I have. Is there any other  
2 for the marks?

3 MR. DORVEE: Yes, that's what I have.

4 THE COURT: All right. Now what about the -- let's  
5 see. Going back to the pretrial order, you said there was  
6 also filed application for a service mark registration for  
7 its use of the flight suit with the U.S. Patent and  
8 Trademark Office in July of 2010. So you're claiming a  
9 service mark for its use of a flight suit?

10 MR. DORVEE: Correct, but it's really -- it's all part  
11 of the trade dress at this point.

12 THE COURT: Oh, it is? See, that's what I'm -- I've  
13 been confused about service mark, trade dress.

14 MR. DORVEE: It's a service mark, your Honor. We  
15 claim that we would use it as a service mark, that's  
16 correct, but it is not a registered service mark yet, but  
17 it's also part of the trade dress.

18 THE COURT: So is your claim for infringement of a  
19 service mark or is your claim for infringement of trade  
20 dress?

21 MR. DORVEE: Both.

22 THE COURT: Okay. The trade dress claim is, I  
23 thought, the flight suit in conjunction with the --

24 MR. DORVEE: Imagery.

25 THE COURT: -- imagery of camouflage netting, of the

1       bullhorns, the running on the stage in flight suits,  
2       etcetera. That's the trade dress.

3             MR. DORVEE: Mostly it is flight suit, plus jet  
4       fighter pilot imagery.

5             THE COURT: Plus jet fighter pilot imagery.

6             MR. DORVEE: The trade dress is the overall  
7       impression, it's not the specificity of the setting.

8             THE COURT: Okay. But how does that -- but how can  
9       you claim also a service mark for the flight suit? I  
10      thought you were saying anybody -- I thought you were  
11      saying this gentleman who's seated in the courtroom, he can  
12      wear his flight suit and he can talk about anything. The  
13      flight suit is not something -- I thought you were saying  
14      the flight suit is not something that we're claiming we  
15      have exclusive right to use.

16            MR. DORVEE: No, that's not what we're saying, your  
17      Honor. What we're saying is we're not claiming, as defense  
18      would claim, we're not claiming nobody anywhere -- we're  
19      not saying, we've asserted our registration. Nobody  
20      anywhere can use a flight suit. The way the law works is  
21      you get a registration. We get our registration. And what  
22      you do is you go after people who are doing confusingly  
23      similar things. It doesn't just say, well, I got this mark  
24      and, therefore, you all can stop. There still has to be  
25      somebody doing something we believe is confusingly similar.

1           And, for example, the testimony of Vernice Armour and  
2 Waldman goes right to that point. Vernice shows up in a  
3 flight suit. She doesn't do what we do. I mean, she talks  
4 about diversity. Mr. Waldman admitted, I don't know what  
5 they do. I give keynotes, but I don't know what they do.  
6 I talk about trust.

7           And I don't think we need to go beyond the facts of  
8 this case. We're saying we have trademark rights in this  
9 flight suit for these consulting services and their  
10 infringement on it. The rest of the world, you know,  
11 that's left for the future. If we get a trademark  
12 registration, if there's likely a confusion, then they're  
13 liable. That doesn't mean we automatically get to go out  
14 and send demand letters to people who want to march in  
15 Memorial Day parades. It has to be something confusingly  
16 similar, i.e., something that's competitive, before we can  
17 even get interested in it.

18           So the mere fact trademarks -- trademark rights are  
19 deemed for use, not for registration. And just because you  
20 got a registration, you don't necessarily -- doesn't mean  
21 you get the whole universe. You can't stop veterans from  
22 -- it has to go through likelihood of confusion analysis.  
23 And in this case they infringed that, and that's as far as  
24 we're going and that is the claim in the case.

25           So just to summarize, we did say we're not trying to

1       sue everybody in the world. We did say there are people  
2       using these flight suits that don't compete with us. They  
3       don't do what we do. We're not interested in going around  
4       the world and stopping everybody from using the flight  
5       suit. That was never the intent.

6               THE COURT: What do you say, Mr. Kruger?

7               MR. KRUGER: Well, I wanted to bring up one point on  
8       the flight suit in particular because it's not registered.  
9       They did put in that application, but that application is  
10      on hold, for lack of a better word. So even though they --  
11      with the other three things that you got as registered  
12      marks, they've been granted. We can still argue about  
13      confusion or not, but those others have been granted. This  
14      flight suit one, whether you call it service or whatever,  
15      it's not been granted. It's on hold, but -- so he's got --  
16      you know, in a sense, the way I understand it, all this  
17      trade dress stuff is more or less like a common law claim.  
18      It's not registered, it's not approved, it's just stuff  
19      that they claim.

20              MR. DORVEE: Trade dress is not a common law claim.  
21      It's under the Lanham Act.

22              THE COURT: Under what?

23              MR. DORVEE: Under the federal Lanham Act in a  
24      trademark case.

25              THE COURT: Yeah, it's in Lanham Act, but it's

1       unregistered. The trade dress claim is not a registered  
2       claim.

3               MR. DORVEE: Correct. As to the flight suit, it would  
4       be an unregistered claim.

5               THE COURT: It's in the Lanham Act, but --  
6       yeah. Well, I think the question before the Court at this  
7       point is -- I'm going to deny the motion for directed  
8       verdict as to the three registered marks. That the  
9       question is whether they've been infringed. That's the  
10      symbol of, "plan, brief, execute, debrief, win," the  
11      "flawless execution," "task saturation." I'm going to deny  
12      the motion for directed verdict as to the unregistered  
13      trademark infringement claims of the "plan, brief, execute,  
14      debrief, win, lessons learned plus design" and "execution  
15      rhythm," so not granted. This was in the case, plan, dot,  
16      brief, dot, execute, dot, debrief equals win, they withdraw  
17      that. Directed verdict granted as to that.

18              Service mark fighter pilot flight suit, the question  
19      is, could the jury -- is there any evidence that there even  
20      could be infringement on a service mark of a fighter pilot  
21      suit? They got the trade dress claim which is -- and I'm  
22      going to deny motion for directed verdict as far as the  
23      trade dress claim.

24              That one they're claiming, you know, we got -- we use  
25      a flight suit in conjunction with, you know, the fighter

1 pilot theme music, the video displays, mimicking the  
2 fighter jet radar screen, the seminar material, mimicking  
3 fighter pilot mission planning documents, parachutes,  
4 camouflage, so I'm denying the motion for directed verdict  
5 as to the trade dress infringement claim. I think there's  
6 a question of fact as to whether the trade dress has been  
7 infringed, but I'm having trouble with this service mark.  
8 All it is is a flight suit. I'm having trouble with that  
9 one.

10 MR. KRUGER: I have one thing to cover on that.

11 THE COURT: Go ahead.

12 MR. KRUGER: Really, I don't think they can claim that  
13 in this case because they didn't even file the service mark  
14 until years after this case was filed so I don't see how  
15 they can be suing us on something they didn't even file  
16 until -- I don't have the date in front of me, but I want  
17 to say it's like 2011 and they filed the case back in 2009.

18 So I mean they want to talk about it and I hear you  
19 about the trade dress part of it, but as far as the service  
20 mark, they can't sue us in 2009 on a service mark they  
21 haven't even applied for until 2011, and which clearly is  
22 on hold under the trademark office; said it's going to be  
23 on hold pending this litigation. So they don't really have  
24 any kind of registered service mark and it's too late. So  
25 I think exactly -- that's why you're having trouble with

1       that, that they shouldn't have a claim on that.

2               MR. DORVEE: Your Honor, he's correct. We don't have  
3 a registration so it would be common law under the Lanham  
4 Act, claim for unregistered designation with regard to the  
5 flight suit. That's all it is.

6               THE COURT: "A service mark is any word, name, symbol  
7 or device or combination used to identify or distinguish  
8 services of one person, including a unique service, from  
9 the services of others and to indicate the source of the  
10 services even if that source is unknown."

11              MR. DORVEE: And in that situation, you have to keep  
12 in mind, you're not -- as you held before, it's not  
13 functional, it's arbitrary. There's no reason why one  
14 needs to use a flight suit as a service mark in business  
15 consulting anymore than there is a clown suit. This is a  
16 service mark. It's something we promote.

17              Trademark office, for what it's worth, prove that  
18 publications, even pending service marks, there is no  
19 disclaimer required under that. They didn't say it was  
20 descriptive. They didn't say it was untimely. The  
21 trademark office asked for that in a publication. Part of  
22 the way you get service mark rights is through usage.

23              Once again, it's not just a registration, it's usage.  
24 The evidence has been we have used it for 18 years, we've  
25 promoted it extensively, we were the first to do this and

1 we're entitled to service mark rights in that based upon  
2 its continuous use, continuous motion and so forth. It is  
3 a symbol of our services.

4 THE COURT: The evidence is you weren't the first to  
5 use it. The evidence is you weren't the first --  
6 Mr. Murphy wasn't the first to use it.

7 MR. DORVEE: In business consulting?

8 THE COURT: Right.

9 MR. DORVEE: I don't think that's correct. And even  
10 if we weren't the first, we're the only -- we're the ones  
11 it's identified with. There's no -- nobody has -- as far  
12 as I know, nobody has used that mark for 18 years. And I  
13 had forgotten. I didn't think he said he wasn't the first.  
14 Be that as it may, he was the first person to use it in  
15 this way, in this non-functional, arbitrary way.

16 THE COURT: Isn't that trade dress? Isn't that your  
17 trade dress claim?

18 MR. DORVEE: It's also a service mark claim. We're  
19 splitting hairs, to be honest with you, your Honor. I  
20 believe we have a service mark claim as well as trade dress  
21 claim. The service mark claim only relates to the flight  
22 suit. The trade dress claim is much broader.

23 MR. KRUGER: Your Honor, in addition to the timing of  
24 filing, they didn't even file for it until after the  
25 lawsuit. Two more things: There's been questions and



1       answers about Chuck Yeager, and that's certainly in  
2       evidence that he did it. There's been questions and  
3       answers about the Sky Warriors and what they taught to who,  
4       whether it was business people and whether it wasn't  
5       business people, but it certainly included business people  
6       and they wore it.

7               And then the last thing, all these things --  
8       trademark, service mark, blah, blah, blah -- they're  
9       supposed to be about identifying a particular  
10      source. Well, this particular service mark application  
11      that they don't file until two years past the lawsuit, it  
12      doesn't identify anything because it is as generic as  
13      anything you could imagine. It's this drawing of a flight  
14      suit, but it doesn't matter what color it is. It could be  
15      purple. It could be orange. That doesn't identify  
16      anybody. It doesn't have any markings on it. The truth  
17      is, there's no testimony that they ever tried to identify  
18      their business with a generic unmarked flight suit. All of  
19      their flight suits have a big Afterburner patch on it, so  
20      there should not be a claim on that.

21             MR. DORVEE: Very briefly, your Honor. Chuck Yeager  
22      has nothing to do with this. Chuck Yeager is a great guy,  
23      hero, he doesn't have the discretion of speaking in his  
24      flight suit. We're not talking about that. That's not  
25      what our service mark claims. We're not saying we can stop

1 everybody, anywhere. And, once again, there's a likelihood  
2 of confusion. Does anybody confuse Chuck Yeager with us?  
3 The answer is no. Is anybody going to confuse Waldo with  
4 us? No, he doesn't do the same thing.

5 The fact of the matter is we're entitled for a service  
6 mark placed against those people that are doing something  
7 that's confusingly similar, and that's the defendants.  
8 What they're trying to argue is there's third party use out  
9 there. That's an argument that goes to the weight of the  
10 evidence, not as to whether or not it goes to the  
11 jury. Third party use, yeah, they can claim for some  
12 reason it's not distinct because we got other people out  
13 there doing this. I think that evidence of third party use  
14 is weak, but it goes to the jury as a service mark claim  
15 and as a trade dress claim.

16 THE COURT: I'd like to take a few moments to review  
17 the law on this and this one issue, so I'll take about five  
18 minutes.

19 (After a recess, proceedings were continued as  
20 follows:)

21 THE COURT: I go back to the definition of service  
22 mark: "A service mark is in the word, name, symbol or  
23 device or combination used to identify and distinguish the  
24 services of one person, including a unique service, from  
25 the services of others."

1           So what is it about a flight suit that itself, the  
2           symbol, distinguishes the services of Afterburner from the  
3           services of anybody else? I'm talking about what kind of  
4           services, and your argument is, well, it's the kind -- no.  
5           The definition is the symbol itself. What is it about the  
6           symbol that distinguishes the services of one versus -- and  
7           there is nothing; nothing, zero. A flight suit, a generic  
8           flight suit, is a flight suit. It is about the symbol  
9           itself, it's not -- it is not a service mark and it is --  
10          motion for directed verdict granted as to the service mark,  
11          not trade dress.

12          Now, I'm denying the motion for directed verdict as to  
13          trade dress. Trade dress is a different animal altogether.  
14          He uses the flight suit in conjunction with all these other  
15          things that he says, you know, showcases his product for  
16          his services in a unique way, that's a question of fact for  
17          the jury; trade dress, not service mark. Motion for  
18          directed verdict granted as to service mark. Now, with  
19          that having been done, all the other motions for directed  
20          verdict are denied.

21          MR. DORVEE: We renewed ours.

22          THE COURT: Yours were denied. So what we have left  
23          as far as the claims are trademark infringements, the  
24          registered trademark infringement claims, the nonregistered  
25          trademark infringement claims that I have already gone

1 over, the trade dress infringement claim. That is -- those  
2 are what is left.

3 The unfair competition claim, I don't think that's a  
4 separate tort. I think that -- I think that is a generic  
5 claim that the trademark infringement and the trade dress  
6 infringement claims fall under. I will entertain argument  
7 about that, but I don't think there's a separate tort for  
8 which a separate jury verdict needs to be rendered.

9 (EXCERPT OF PROCEEDINGS REPORTED IS CONCLUDED.)  
10 \_\_\_\_\_  
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CERTIFICATE OF COURT REPORTER

STATE OF GEORGIA )

COUNTY OF HABERSHAM )

I, Kayla Peters, Certified Court Reporter, do hereby certify that proceedings were held in the above-entitled case at the time and place set forth in the caption hereof; that I was authorized to, and did, report in shorthand the testimony and proceedings had in said proceedings, and that the foregoing pages, numbered 1 through 34, inclusive, constitute a true and correct transcription of a portion of my said shorthand report.

WITNESS MY HAND THIS 4th day of April, 2014, at Habersham County, Georgia.

---

Kayla Peters, RPR, CCR  
Certified Court Reporter  
Georgia Certificate #2668