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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
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**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

**MOTION FOR RECONSIDERATION**

Opposer The Corps Group brings this Motion for Reconsideration of the Board's August 1, 2017 Order denying Opposer's Motion for Summary Judgment based on collateral estoppel. Specifically, Opposer respectfully requests that the Board reconsider its ruling that the Georgia court's holding that the flight suit design was "a generic flight suit" and "not a service mark" was not a decision that the flight suit design was generic. Although the Board may not agree with the court's determination, the court clearly held that the flight suit design is generic and that holding precludes Afterburner from re-litigating the identical issue in this proceeding.

Trademark Rule 2.127(b) permits a party to request reconsideration by demonstrating that the Board's ruling was in error based on the facts before it and the applicable law. *In re Point Noir Pty Ltd.*, 2009 TTAB LEXIS 51, \*2 (TTAB 2009) (citing TBMP § 1219.01 (2d ed. rev. 2004)). As discussed below, based on the facts and applicable law, the Board's denial of summary judgment in favor of Opposer was in error.

## **I. SUMMARY OF RELEVANT FACTS**

Afterburner filed a complaint in the Superior Court of Forsyth County, Georgia in October 2009 alleging that The Corps Group infringed several trademarks and its alleged trade dress, including the design of a flight suit as used in connection with business consulting services. While the state court litigation was pending, on July 28, 2010, Afterburner filed Application Serial No. 85,094,889 (the “Application”), which seeks to register the same design that was the subject of the lawsuit pending in Forsyth County; namely, a three-dimensional pilot flight suit in connection with “business management consultancy services; executive search and placement services; personnel placement and recruitment” in Class 35 and “providing seminars in motivational and management training; educational and entertainment services, namely, providing keynote motivational and educational speakers and providing personal and group coaching and learning forums in the field of leadership development” in Class 41.

On September 28, 2011, The Corps Group opposed the Application. Shortly thereafter, Afterburner filed the “Motion to Suspend for Civil Action.” In that motion, Afterburner argued that the Board should suspend this proceeding “because the claims asserted by Opposer are essentially duplicates of claims and affirmative defenses set forth by Opposer in a pending civil action.” Mot. to Suspend at 1. As a result, Afterburner argued that “the outcome of the civil action will have a bearing on this proceeding.” *Id.* at 2. On December 14, 2011, the Board granted Afterburner’s motion to suspend.

After four and one-half years of discovery and other pretrial proceedings, in April 2014, the Forsyth County Superior Court held a seven day jury trial in connection with the parties’ claims. After Afterburner finished presenting its case-in-chief, The Corps Group and the other defendants moved for a directed verdict with respect to the claim for infringement of

Afterburner's flight suit design on the basis that the design was generic and did not have secondary meaning. *See* Borneman Decl. ¶ 7, Ex. A-4 at 951:14-18; 952:8-13.<sup>1</sup> In response, Afterburner's counsel argued that the flight suit was not generic and had secondary meaning. Borneman Decl. ¶ 7, Ex. A-4 at 955:2-18. Initially, the court denied the motion for directed verdict with respect to the flight suit design. Borneman Decl. ¶ 7, Ex. A-4 at 965:10-14.

At the close of all evidence, The Corps Group renewed its motion for directed verdict on the claim for infringement of Afterburner's flight suit design. *See* Borneman Decl. ¶ 8, Ex. A-5 at 1528:24-1529:11. When announcing its decision on this issue, the court held there was "nothing; nothing, zero" about the flight suit that distinguished the services of one company from another. Borneman Decl. ¶ 8, Ex. A-5 at 1541:18-24. The judge stated: "So what is it about a flight suit that itself, as a symbol, distinguishes the services of Afterburner from the services of anybody else?... A flight suit, a generic flight suit, is a flight suit...it is not a service mark...." *Id.* at 1541:14-24. The court proceeded to grant a directed verdict in favor of The Corps Group verdict as to the claims for infringement of the flight suit design. *Id.* Afterburner did not move for reconsideration and did not appeal the judge's ruling even though it later pursued an appeal to the Georgia Supreme Court on other issues. Borneman Decl. ¶ 10. After the Georgia Supreme Court denied Afterburner's petition for a writ of certiorari on May 9, 2016, and the time for Afterburner to seek review by the United States Supreme Court passed 90 days later, the judgment that the flight suit design was generic and not protectable became final and non-appealable in August 2016.

On April 7, 2017, Opposer filed a Motion for Summary Judgment in which it argued that collateral estoppel applies in this case to prevent Afterburner from re-litigating the issue of

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<sup>1</sup> The citations in this Motion refer to declarations and exhibits that were attached to Opposer's Motion for Summary Judgment.

whether its flight suit design is protectable as a trademark. After the motion was fully briefed, the Board issued an Order denying summary judgment on the basis that there were material issues of fact as to whether the issues in the civil case are identical to the issues in this proceeding because, although the court clearly held that the flight suit design was not protected as a service mark at the time of the trial, the court did not address whether the flight suit could acquire distinctiveness. Order at 10. The Board also stated: “[w]e do not interpret the court’s ruling as holding that the Pilot Flight Suit is incapable of indicating source because it is generic. In this regard, we agree with Applicant that the court’s statement that “[a] flight suit, a generic flight suit, is a flight suit” was not a legal determination that the Pilot Flight Suit is generic in the trademark sense but rather a colloquial use of the term to refer to the plain, unadorned nature of the Pilot Flight Suit.” Order at 12.

## **II. ARGUMENT**

Although the court used the term “generic” when it granted a directed verdict, the Board inexplicably construed the court’s use of that term as “a colloquial use of the term that refers to the plain, unadorned nature” of the flight suit design. Order at 12. In so doing, the Board disregarded the court’s explicit holding that the flight suit was generic and therefore not protectable as a trademark.

The Board’s position that the court used the term “generic” in the colloquial, as opposed to the legal, sense is not credible. The court was deciding whether to grant a directed verdict, which is by definition a question of law, regarding whether the flight suit design was protected as a service mark. The court used the term “generic” when it determined that the flight suit design was not protected. In the context of this legal determination, it is implausible that the court was not using the term “generic” in its legal sense.

Other parts of the court’s analysis of the issue of the protectability of the flight suit design confirm that the court held that the flight suit was generic in the legal sense. The court considered the definition of the term “service mark” from the Trademark Act, 15 U.S.C. § 1127, which caused it to focus on whether the symbol distinguishes the services of one person from the services of others. The court neither stated that the flight suit design was not protectable as a service mark because Afterburner had failed to prove secondary meaning, nor even alluded to the concept of secondary meaning. Instead, despite Afterburner’s use and advertising of the flight suit design over a long period of time, the court held that there was “nothing; nothing, zero” about the flight suit that distinguished the services of one company from another. Borneman Decl. ¶ 8, Ex. A-5 at 1541:18-24. This is a strong statement that consumers would not view the flight suit design as a source-identifier. Particularly when this language is combined with the court’s use of the term “generic,” it is clear that the court intended to hold that the flight suit design is generic in the legal sense of the term.

While Afterburner bent over backwards to convince the Board that the court used the term “generic” in a non-legal manner, the more obvious and only reasonable conclusion is that the court held the flight suit design was generic. After all, one of The Corps Group’s defenses to Afterburner’s claims was that the claimed trademarks were generic. *See* Borneman Decl. ¶ 6, Ex. A-3 (Twenty-Ninth Defense). To the extent the Board disagreed with the court’s determination that the flight suit is generic, the Board cannot disregard the clear holding of the court because it thinks the decision is wrong. The Supreme Court has made it clear that collateral estoppel applies to all final judgments on the merits, even a decision that may have been wrong. *See, e.g., Federated Dep’t Stores v. Moitie*, 452 U.S. 394, 398 (1981) (the “consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the

judgment may have been wrong.”); *Reed v. Allen*, 286 U.S. 191, 201 (1932) (“(A) judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong”). Numerous Circuit court cases have affirmed this principle. *See, e.g., Ginters v. Frazier*, 614 F.3d 822, 826 (8th Cir. 2010) (“Even wrongly decided questions may be precluded from reconsideration under the [collateral estoppel] doctrine.”); *Recoverededge, L.P. v. Pentecost*, 44 F.3d 1284, 1296 (5th Cir. 1995) (“It is well settled, however, that even arguably erroneous judgments have preclusive effect if the requirements for collateral estoppel are satisfied.”); *Disabled Am. Veterans v. Commissioner*, 942 F.2d 309, 316 (6th Cir.1991) (“It requires more than mere belief that a case was wrongly decided to avoid the application of the collateral estoppel doctrine.”); *Cutler v. Hayes*, 260 U.S. App. D.C. 230, 818 F.2d 879, 888 (D.C.Cir.1987) (“A valid jurisdictional judgment has preclusive effect, we note, even if erroneous.”).

The rationale underlying the collateral estoppel doctrine is that “a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again.” *Mother’s Rest., Inc. v. Mama’s Pizza, Inc.*, 723 F.2d 1566, 1570 (Fed. Cir. 1983). Permitting the Board to evaluate or second-guess the correctness of the court’s decision would lead to “uncertainty and confusion,” which would frustrate the purpose of the collateral estoppel doctrine. *See Federated*, 452 U.S. at 398-99.

Afterburner had the opportunity to appeal the court’s decision if it thought the court’s decision was wrong, and it even went so far as to file a petition for a writ of certiorari with the Georgia Supreme Court on other issues. Afterburner knew The Corps Group had opposed registration of the application for the flight suit design and knew, or should have known, that the trial court’s determination on the issue of the protectability of the flight suit design would have a

preclusive effect in this proceeding. Thus, Afterburner had every incentive to appeal the court's decision. Yet, Afterburner chose not to appeal the decision and must live with the obvious and natural consequences of that decision.

Even if the Board believes the issue was wrongly decided, the decision of the court that the flight suit design was generic is clear and collateral estoppel prevents Afterburner from litigating this issue a second time.

### **III. CONCLUSION**

For the foregoing reasons, Opposer respectfully requests that the Board reconsider its decision and grant summary judgment in favor of Opposer under the collateral estoppel doctrine.

Dated: August 31, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Reconsideration has been sent via email, this 31st day of August, 2017 to:

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/s/ Jordana S. Rubel  
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