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

Proceeding	91201830
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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.

Opposition No. 91201830

Application No. 85094889



Mark:

OPPOSITION TO OPPOSER’S MOTION FOR RECONSIDERATION

Applicant Afterburner, Inc. (“Applicant” or “Afterburner”) hereby opposes The Corps Group (“Opposer” or “TCG”) motion for reconsideration of the Trademark Trial and Appeal Board’s (“the Board”) denial of TCG’s motion for summary judgment pursuant to Federal Rule of Civil Procedure Rule 56(b) and Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) Rule 528. For reasoning set forth below, the Board’s sound reasoning was correct: Opposer has not demonstrated that there is no genuine dispute of material fact that the issue decided by the Georgia court is identical to the issues before the Board in this proceeding. Because all of the elements of issue preclusion were not met, Opposer’s motion for summary judgment was properly denied.

INTRODUCTION

Opposer TCG’s motion for reconsideration of the Board’s order denying TCG’s motion summary judgment is a woefully inadequate attempt to bar Afterburner altogether from pursuing registration of its Pilot Flight Suit as a mark for its services.

TCG alleges that the Board erred denying summary judgment because the Board, in reviewing TCG's issue preclusion claim, "disagreed with the court's determination that the flight suit is generic"; and "the Board cannot disregard the clear holding of the court because it thinks the decision is wrong." In support of its motion for reconsideration, TCG relies on the same excerpted court transcripts in the summary judgment decision. TCG also cites cases by for the proposition that collateral estoppel applies to all final judgments on the merits, even a judgment that may have been wrong.

LEGAL STANDARD OF REVIEW

A motion for reconsideration under Trademark Rule 2.127(b) is limited to a demonstration that on the basis of the facts before the Board and applicable law, the Board's ruling was in error and requires appropriate change. TBMP § 518. Such a motion may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. *Id.*

ARGUMENT

I. OPPOSER'S ARGUMENT THAT THE BOARD DISREGARDED THE STATE COURT HOLDING IS UNFOUNDED, A REARGUMENT OF POINTS PREVIOUSLY MADE IN ITS MOTION FOR SUMMARY JUDGMENT, AND AN IMPROPER ATTEMPT TO INVOKE TRADEMARK RULE 2.127(b).

Opposer argues that the Board disregarded the state court holding because "it is clear that the court intended to hold that the flight suit design is generic in the legal sense of the term." (TCG Motion p. 5) Applicant disagrees. It is "clear," however, that TCG made this genericness argument about the state court holding in both briefs on the summary judgment motion. (See TCG Brief pp. 2, 3 6, 8; TCG Reply Brief p. 1) Now in its motion for reconsideration, and contrary to Trademark Rule 2.127(b), TCG "clearly" wants to reargue the same genericness argument – an argument that was not

disregarded, but rather, fully addressed by the Board in the Order. (Order at p. 12) As pointed out by the Board, “In reaching our decision, all of the parties’ arguments were carefully considered in light of the evidence of record, although we do not find it necessary to discuss all of them in our opinion.” (Order at p. 1 citing *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019-20 (TTAB 2015)). Yet, the Board did discuss Opposer’s genericness argument about the state court holding; and reconsideration should be denied because the argument is irrelevant and is simply “a reargument of the points presented in a brief on the original motion.” TBMP § 518.

II. OPPOSER’S ARGUMENT THAT THE BOARD DISAGREED WITH THE STATE COURT HOLDING IS ALSO UNFOUNDED.

- A. After reviewing Opposer’s arguments, the trial transcripts, and the opposition record, the Board gave a sound interpretation of the state court’s cryptic holding.

Opposer contends that “the Board disagreed with the court’s determination that the flight suit is generic.” (TCG Motion p. 5) Actually, it is Opposer that disagrees with the Board’s interpretation of the state court’s holding. And it is Opposer that really really disagrees with the Board’s summary judgment decision. The fact that the Board had to “interpret” the state court’s holding is key here. Rather than specifically identifying the issues that the state and Board proceedings purportedly share, TCG continues to argue that the state court “clearly” held that Afterburner’s Pilot Flight Suit is generic. Yet, TCG only points to one court transcript excerpt – after a seven-day jury trial – where the court actually used the word “generic.” (“A flight suit, a generic flight suit, is a flight suit...it is not a service mark....” (TCG’s Ex. A-5 at 1541:20-21)). It is no wonder the Board had to delve further into the record and trial transcripts to interpret this “clear” ruling as it relates to genericness. The Board’s interpretation of the court’s

only use of the word “generic” is not tantamount to a disagreement with the ruling of the state court. The Board’s interpretation is sound, the TCG’s contention that the Board disagreed with the state court ruling is groundless, and the “collateral estoppel/wrongly decided decision” case law cited by TCG is pointless in this reconsideration.

- B. The state court transcript and notice of opposition actually support the interpretation that the court used the term “generic” in the colloquial sense.

Opposer argues that “[t]he Board’s position that the court used the term “generic” in the colloquial, as opposed to the legal, sense is not credible.” (TCG Motion p. 4) However, TCG’s “generic mark” argument is uncorroborated in the state court transcripts. The state court judge used the word “generic” as a mere modifier for the term “flight suit.” (A flight suit, a generic flight suit, is a flight suit...it is not a service mark....” TCG’s Exhibit A-5 at 1541:20-21.) It is highly reasonable for the Board to conclude that this usage referred to the plain, unadorned nature of the Afterburner’s Pilot Flight Suit. (Order at p.12) This is especially true when considering that prior to the state court’s ruling, TCG argued motions for directed verdict as follows:

So, aside from the fact that they don't have a trademark on their generic, you know, green, no-marks flight suit. They've applied for one, which seems ridiculous because it's clearly generic. They don't have it yet. TCG’s Exhibit A-4 at 951:14-18.

Well, this particular service mark application ... it doesn’t identify anything because it is as generic as anything you could imagine. It’s this drawing of a flight suit, but it doesn’t matter what color it is. It could be purple. It could be orange. That doesn’t identify anybody. It doesn’t have any markings on it. The truth is, there’s no testimony that they ever tried to identify their business with a generic unmarked flight suit. All of their flight suits have a big Afterburner patch on it, so there should not be a claim on that. TCG’s Exhibit A-4 at 1539:3–1540:8.

Also, in the notice of opposition, as pointed out by the Board, TCG similarly uses the term “generic” in a manner seemingly intended as synonymous with “plain” or

“unadorned.” (Order at p. 12 footnote 12 citing Notice of Opposition ¶ 1 (1 TTABVue 4)) Therefore, contrary to TCG’s assertion, the state court’s characterization of Applicant’s mark being generic was not “clear,” and definitely was not a legal determination of the trademark significance of Afterburner’s mark.

C. Opposer’s contention that the state court found Afterburner’s Pilot Flight Suit “generic” in the trademark sense is irrelevant to TCG’s issue preclusion claim.

TCG wants desperately to convince the Board that the state court ruled Afterburner’s Pilot Flight Suit “is not a service mark” because it is generic. The Board, as detailed above, graciously addressed this argument in the Order. Yet, the argument itself is irrelevant and fruitless for two reasons: firstly, and most importantly, TCG is unable to meet any of the elements of issue preclusion because it has not shown that the issue decided by the Georgia court is identical to the issues before the Board in this proceeding. TCG’s “generic mark” argument pertains to an issue decided by the Georgia court; thus, it is an irrelevant argument as it pertains to the non-identical issues before the Board in this proceeding, and it has no effect in precluding Afterburner from seeking registration.

Secondly, assuming, *arguendo*, that the state court found Afterburner’s Pilot Flight Suit to be generic in the trademark sense, TCG fails to recognize that a separate, alternative, determination establishing that Afterburner’s Pilot Flight Suit has acquired distinctiveness would overcome an initial genericness finding. As pointed out by the Board, “it is not evident from the court’s ruling that it considered, let alone decided, whether or not Applicant’s Pilot Flight Suit is capable of functioning as a source identifier. In this regard, the court did not address whether or not the Pilot Flight Suit could acquire distinctiveness as a mark.” (Order at p. 10) Thus, Applicant would not be

barred by the rule of claim preclusion from seeking registration of its Pilot Flight Suit under Trademark Act Section 2(f) or on the Supplemental Register.

It should be noted, however, that Applicant maintains that Afterburner's Pilot Flight Suit is inherently distinctive and has claimed Trademark Act Section 2(f) in the alternative.¹ Applicant also maintains that its mark has become a distinctive source identifier for its services and is entitled to registration. Opposer's "generic mark" argument is no more than an irrelevant reargument of the points presented in TCG's summary judgment briefs. Reconsideration should be denied because "there is no requirement that the Board repeat or address irrelevant arguments in entertaining a motion." *Guess? IP Holder LP* at 2019-20.

CONCLUSION

A careful review the August 1, 2017 Order denying TCG's motion for summary judgment reveals that the Board more than adequately explained why Opposer did not meet all of the elements of issue preclusion. The Board set forth the legal standard, the requirements for issue preclusion, and the allegations in the motion which did not satisfy those requirements. Nothing more was necessary to explain why there are genuine disputes of material fact regarding whether the issues decided by the state court are identical to the issues in this proceeding. Opposer's further arguments regarding matters other than the legal sufficiency of its issue preclusion claim are superfluous.

¹ Applicant notes that the Board in the Order determined that Applicant's Section 2(f) claim was not filed in the alternative and that Applicant has conceded that the Pilot Flight Suit is not inherently distinctive. (Order at p. 11) Actually, the opposite is true. Attached is Applicant's office action response (without attached Section 2(f) evidence) dated May 30, 2011. (Office Action pp. 4-7) Applicant requests that the Board take the necessary corrective measures in its decision so that there is a more complete record in the event that Applicant appeals and/or prevails on the underlying refusal and the opposition.

The Board did not err by “disregarding” or “disagreeing” with the Georgia state court holding. Because Opposer’s evidence, the law, and the facts do not support application of the doctrine of issue preclusion, Applicant respectfully requests that the Board deny Opposer's motion for reconsideration.

This 15th day of September, 2017.

Respectfully submitted,

By: /s/ Michael C. Mason
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this correspondence, OPPOSITION TO
OPPOSER'S MOTION FOR RECONSIDERATION, has been sent via email, with
consent to:

J. Kevin Fee
Jordana S. Rubel
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004

This 15th day of September, 2017.

/s/ Michael C. Mason
Michael C. Mason

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application Serial No.: 85094889
Filed: July 28, 2010
Applicant: Afterburner, Inc.
Trademark Attorney: Asmat Khan
Law Office 114

RESPONSE TO OFFICE ACTION

In response to the Office Action dated November 30, 2010 (the “Office Action”), the Applicant responds as follows:

ARGUMENTS

I. Informalities

A. Description of the Mark

Although the Applicant believes its original description of the mark was accurate and complete, the Examining Attorney states that it “is unclear whether the applicant intends the mark to be the stylized depiction of the whole pilot suit or of a particular feature of the suit.” The Applicant disagrees that its mark is stylized, but maintains that it is a three-dimensional depiction of an actual pilot flight suit. Also, the Applicant answers that the mark is an *entire* pilot flight suit as used in the rendering of the Applicant’s services.

The Examining Attorney in her description suggestion indicates that “usage of the mark as a source indicator” should be added to the Applicant’s description. The Applicant can find no basis for this in the Trademark Manual of Examining Procedure (TMEP) - 7th Edition, but has attempted to fulfill this indicated request. The Applicant submits the following as its amended description of the mark:

The mark consists of a three-dimensional depiction of an entire pilot flight suit as worn by applicant's employees and contractors in rendering applicant's services. The broken lines in the drawing are not part of the mark but are merely intended to show the position of the mark.

"Generally, amending the description of the mark is liberally permitted, so long as the drawing supports the description." TMEP §808.03(e). The Applicant requests that the Examining Attorney find this description of the mark acceptable and implores the Examining Attorney to call the Applicant before maintaining a final office action on this requirement.

B. Specimen

The Examining Attorney has stated that the specimen of record is unacceptable because it does not show the applied-for mark used in connection with the Applicant's services. The Applicant respectfully requests that the Examining Attorney accept the substitute specimens submitted along with this Response, as they show the Pilot Flight Suit in use in commerce for the services specified in the Applicant's application. Each attached specimen is used in the sale and marketing of the Applicant's services, highlights the Pilot Flight Suit mark, and shows the Pilot Flight Suit mark as actually used in the sale or advertising of the Applicant's services recited in the application. See TMEP § 1301.04. In each specimen, the Pilot Flight Suit is shown in close proximity to various discussions and/or descriptions of Afterburner's services, thus showing an association between the Pilot Flight Suit and the Applicant's services. See TMEP § 1301.04(b).

Furthermore, a specimen that shows the mark as used in the course of rendering or performing the services is generally acceptable. See TMEP § 1301.04(b). Where the record shows that the mark is used in performing the services, a reference to the services on the specimen itself may not be necessary. See TMEP § 1301.04(b). The Pilot Flight Suit is worn while the Applicant performs its services. All of the Applicant's speakers and presenters are required to wear the Pilot Flight Suit during Afterburner seminars, keynote addresses and other

training events. Accordingly, each substitute specimen submitted with this Response shows the Pilot Flight Suit used in the course of rendering the Applicant's services. The Applicant's marketing materials include images of presenters in the Pilot Flight Suit during actual Afterburner events. The Applicant has also included photographs taken during events, each showing representatives of the Applicant wearing the Pilot Flight Suit while rendering the Applicant's services. Thus, the Applicant requests that the Examining Attorney accept the substitute specimens as acceptable, and submits with this Response a verified declaration containing the appropriate statement concerning use.

II. The Applied-For Mark Functions as a Service Mark

The Examining Attorney has refused registration of the Pilot Flight Suit service mark on grounds that, as depicted in Applicant's specimen of record, the Pilot Flight Suit fails to function as a mark. The Applicant respectfully requests the Examining Attorney withdraw the refusal and accept the substitute specimens submitted along with this Response, as they indeed show: 1) the Pilot Flight Suit used in connection with the Applicant's business management consulting, seminar and placement services; and 2) that the Pilot Flight Suit is a source identifier of these services.

As previously stated, each attached specimen is used in the sale and marketing of the Applicant's services and highlights the Pilot Flight Suit as a service mark. These materials are distributed to clients frequently in efforts to sell the Applicant's services. In each specimen, the Pilot Flight Suit is shown in close proximity to various discussions and/or descriptions of Afterburner's services, which serves to connect the Pilot Flight Suit mark to the Applicant's services. Also, both the marketing materials and the photographs submitted by the Applicant show the Pilot Flight Suit mark as used as a mark in the course of rendering the Applicant's

services. As a result of the Applicant's use of the Pilot Flight Suit within its marketing materials and while performing its services, consumers viewing the Applicant's marketing materials or its services inevitably link the Pilot Flight Suit as a mark to the Applicant's services. Therefore, the Applicant requests that the Examining Attorney find that the applied-for mark as used on the submitted specimens functions as a service mark.

A. The Applied-For Mark is Inherently Distinctive

The Examining Attorney has also indicated that the Applicant must submit evidence of acquired distinctiveness of the Pilot Flight Suit mark. However, the Applicant respectfully asserts that the Pilot Flight Suit mark is inherently distinctive, and thus no evidence of acquired distinctiveness is necessary for registration on the Principal Register. See TMEP § 1202.02.(b)(ii).

The Examining Attorney must establish a prima facie case as to why the Applicant's mark is not inherently distinctive. See TMEP § 1202.02(b)(ii). "To meet this burden, the examining attorney must at a minimum, set forth a 'reasonable predicate' for its position of no inherent distinctiveness." TMEP § 1202.02(b)(ii). The Examining Attorney's position as to why the Applicant must prove acquired distinctiveness is unclear. Thus, the Applicant requests that the Examining Attorney consider the following arguments in favor of inherent distinctiveness of the Pilot Flight Suit mark.

According to TMEP §1202.01(b)(ii), the test for determining inherent distinctiveness was set forth in Seabrook Foods, Inc. v. Bar-Well Foods, Ltd., 568 F.2d 1342, 1344, 196 USPQ 289,

291 (C.C.P.A. 1977). An analysis of the applicable *Seabrook* factors indicates that the Pilot Flight Suit is indeed inherently distinctive.¹

First, the Pilot Flight Suit is not a common basic shape or design when viewed in the context of the business management consulting or seminar industry. Although the Pilot Flight Suit is similar to those worn by military professionals, it is uncommon among business management training professionals.

Second, the Pilot Flight Suit is unique and unusual in the field in which it is used. The Applicant was the first business management training firm to utilize the Pilot Flight Suit and has been using the Pilot Flight Suit substantially exclusively for over 15 years. The Applicant's speakers and presenters wear the Pilot Flight Suit while rendering the Applicant's services, rather than business attire as would competitors of Afterburner. The Applicant's use of the Pilot Flight Suit is unique, unusual and unexpected and, as attested to in the client affidavits attached to this Response, is automatically perceived by consumers to be a service mark of the Applicant. The Pilot Flight Suit does not fall into the realm of attire typically worn by business management training firms while rendering services, nor is it typical of the type of trade dress similar firms use to identify the source of their services.

Third, the Pilot Flight Suit is certainly not "a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods." TMEP §1202.01(b)(ii). As stated previously, the Pilot Flight Suit is not commonly used in the business management training industry, nor is it a well-

¹ The fourth *Seabrook* factor, which analyzes whether the proposed mark is "capable of creating a commercial impression distinct from the accompanying words" is not applicable here. The Pilot Flight Suit does not include any wording.

known form or ornamentation for this class of services. The Applicant is the sole rightful user of the Pilot Flight Suit in the business management training industry.

Additionally, the Applicant contends that, to the extent the USPTO recognizes the spectrum of distinctiveness test as applicable to trade dress, the Pilot Flight Suit is an arbitrary service mark and therefore inherently distinctive. There is nothing about the Pilot Flight Suit that is descriptive or suggestive of the Applicant's services. The Pilot Flight Suit is certainly not generic as it does not conform to established industry customs of packaging for similar services. Courts have indicated that, because packaging is usually indicative of source, packaging trade dress is typically arbitrary, fanciful or suggestive. See Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 379 (2d Cir. 1997); see also RNA Corp. v. Procter & Gamble Co., 747 F. Supp. 2d 1008, 1016 (N.D. Ill 2010); Gross v. Bare Escentuals Beauty, Inc., 641 F. Supp. 2d 175, 193 (S.D.N.Y. 2008). Arbitrary, fanciful and suggestive trade dress is inherently distinctive. See Id.

Based on the foregoing, the Pilot Flight Suit mark is inherently distinctive. The Applicant respectfully requests that the Examining Attorney withdraw the request for evidence of acquired distinctiveness and find that the Pilot Flight Suit is inherently distinctive.

B. In the Alternative, The Applied-For Mark Has Acquired Distinctiveness

The Examining Attorney has requested that the Applicant submit evidence of acquired distinctiveness of the Pilot Flight Suit mark. As set forth above, the Pilot Flight Suit mark is inherently distinctive and no acquired distinctiveness evidence is necessary for its registration on the Principal Register. However, the Applicant submits the following arguments in support of a finding of acquired distinctiveness of the Pilot Flight Suit, as well as supporting evidence. The

Applicant, by presenting this alternative claim of acquired distinctiveness, does not concede that the Pilot Flight Suit is not inherently distinctive. See TMEP § 1212.02(c).

The Applicant claims acquired distinctiveness of the Pilot Flight Suit mark based on five years use. The Applicant has been using the Pilot Flight Suit substantially exclusively and continuously in commerce for over 15 years, as attested to in the attached Affidavit of James D. Murphy, the founder and CEO of the Applicant. Thus, the Pilot Flight Suit has become distinctive of the Applicant's services, through the Applicant's substantially exclusive and continuous use in commerce for at least five years immediately before the date the Affidavit of James D. Murphy was executed. See TMEP § 1212.05.

The Applicant also claims acquired distinctiveness of the Pilot Flight Suit based upon actual evidence of distinctiveness. See TMEP § 1212.06. First, the Pilot Flight Suit has become distinctive as a result of the Applicant's long term use of the mark in commerce. See TMEP § 1212.06(a). As set forth above, and in the Affidavit of James D. Murphy, the Applicant has been using the Pilot Flight Suit substantially exclusively and continuously in commerce for over 15 years.

Second, the Applicant has spent millions of dollars in promoting and advertising its services in connection with the Pilot Flight Suit, as attested to in the attached Affidavit of Scott Leonard, the Vice President of Business Development for the Applicant.² As stated in the Affidavit of Scott Leonard, the Applicant markets and advertises its services through the Applicant's website, printed marketing collateral, email distribution campaigns, event-specific printed marketing collateral, book publishing and related media, marketing through speakers

² In order to maintain the confidentiality of the Applicant's marketing expenditures and revenue information, the Applicant has not included the actual amounts of expenditures on marketing campaigns featuring the Pilot Flight Suit or gross revenue acquired under the Pilot Flight Suit. Instead, the Applicant has followed TMEP § 1212.06(b) and has only included types of media through which its services have been advertised and how frequently the advertisements have appeared.

bureaus, newsletters, press releases, printed promotional materials, and marketing video distributions. These materials, all of which feature the Pilot Flight Suit in connection with the Applicant's services, are frequently distributed by the Applicant directly to clients and prospective customers in an effort to sell the Applicant's services. On a quarterly basis, the Applicant's marketing materials reach about 55,000 people. On a monthly basis, the Applicant's website receives about 300 visits from new consumers.

Third, the Applicant's extensive marketing efforts have resulted in tremendous sales success for the Applicant, as evidenced in affidavits provided by James Murphy and Scott Leonard. The Applicant has earned a large amount in gross revenue for the provision of services in connection with the Pilot Flight Suit. Indeed, the Applicant has successfully educated the public to associate the Pilot Flight Suit with the Applicant's services.

Fourth, as evidenced by the attached affidavits from clients of the Applicant, the Pilot Flight Suit is recognized as source indicator of the Applicant. The client affiants have attested to the fact that they recognize the Pilot Flight Suit as a service mark belonging to the Applicant, and associate the Pilot Flight Suit with the Applicant's services.

Finally, the Applicant submits that even foreign consumers recognize the Pilot Flight Suit as a service mark identifying Afterburner's services. Philip Eldridge, a licensee of the Applicant, has stated in his Statutory Declaration, the Australian legal equivalent of an affidavit, that "throughout the Australian and New Zealand consulting and seminar industry the use of the Fighter Pilot flight suit is exclusively associated with Afterburner."

Based on the foregoing, the Applicant submits that the Pilot Flight Suit has acquired distinctiveness. Without waiving its claim of inherent distinctiveness of the Pilot Flight Suit, the Applicant respectfully requests that the Examining Attorney accept the submitted evidence as a

sufficient showing of acquired distinctiveness and withdraw her refusal.

REMARKS

The Applicant believes that the application is now in order and in condition to be published. Therefore, the Applicant respectfully requests publication of the application at the earliest possible date.

In the event that an issue arises that can be addressed in a telephone interview, the Examining Attorney is invited to contact the undersigned at (404) 835-3500.