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Mailed: 4/5/04
Paper No. 23
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trafalgar Holdings, Inc.

Serial No. 75673450

Jeffrey L. Costellia of Nixon Peabody LLP for Trafalgar Holdings, Inc.

Allison Hall, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Hanak and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Trafalgar Holdings, Inc., has appealed from the final refusal of the trademark examining attorney to register the mark SUN AIRWAYS for the following services (as amended):¹

Computer software for cargo transportation and printed user manuals sold as a unit therewith; and computer software

¹ Application Serial No. 75673450; filed April 2, 1999, alleging a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act.

used for travel planning and reservations [and] printed user manuals sold as a unit therewith. In Class 9.

Brochures; guidebooks, newsletters, magazines, and books all relating to travel; paper goods and printed matter, namely, postcards, unmounted photographic prints, plastic cards; onboard airplane retail general merchandise catalogs; inflight general interest magazines. In Class 16.

Mugs, plastic cups and beverage glassware. In Class 21.

Sweatshirts; jackets; clothing for men, women and children, namely hats, caps, t-shirts, shirts, ties and jackets. In Class 25.

Cigarette lighters not of precious metal; matches. In Class 34.

Retail services available on board domestic and international airline flights featuring cosmetics, liquor, and gift items of cosmetics, perfume and liquor. In Class 35.

Credit card services providing for payments of airline tickets, hotel accommodations, and car rentals; and issuing credit cards. In Class 36.

Transportation of persons, mail and freight by air on regularly scheduled flights over defined routes; warehouse storage services and freight forwarding services; arranging tour packages for people attending trade conventions and meetings; arranging public charters by plane; car rental services for corporations and others; travel agency services, namely, making reservations and bookings for transportation; airport baggage pickup, delivery and storage services for others; providing transportation information and other travel related information. In Class 39.

Leasing airport space and aircraft equipment for videotape and film productions; educational services, namely, providing technical training to individuals for employment in airline and transportation industries; operation of lounge facilities at airports and other locations; arranging for tickets or reservations for recreational activities, cultural activities, sporting events and

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entertainment for special customers of an airline;
producing television programs about travel for broadcast
cable [sic] television. In Class 41.

Arranging hotel accommodations, restaurant services,
bathing facilities and business lounge services for air
travelers; airport restaurant services; travel agency
services, namely, making reservations and booking for
temporary lodging. In Class 42.

The word "AIRWAYS" is disclaimed.

The trademark examining attorney has refused registration
under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on
the ground that applicant's mark, when applied to applicant's
goods and services, so resembles the mark shown below for
"airplane and helicopter charter services, namely, providing air
transportation for government and industrial personnel and
equipment, air shuttle transportation for executives, and
flightseeing excursions; flight instruction and training" as to
be likely to cause confusion.²



The word "AIR" is disclaimed in the registration.

² Registration No. 2316290, issued February 8, 2000.

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When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

We note that some of the issues in this case were the subject of a prior Board decision. In a related application,³ applicant herein sought to register the same mark, SUN AIRWAYS, for the following single class of services:

Transportation of persons, mail and freight by air on regularly scheduled flights over defined routes; air transportation services featuring bonus programs for frequent air travelers, namely priority boarding check-in, seating and reservation services, ticket upgrades, and augmented frequent flyer mileage. In Class 39.

Both applications list "transportation of persons, mail and freight by air on regularly scheduled flights over defined routes" as part of the Class 39 services. The remaining Class 39 services are different in each application.

Registration was refused, in that application, under Section 2(d) of the Trademark Act on the basis of the same registration cited herein, and the Board affirmed the refusal to register in an unpublished decision issued June 11, 2003. The Board found, based on the record before it, that the two marks are similar in appearance, pronunciation, connotation and commercial impression, that the services are closely related, that the customers for these services and the channels of trade are not necessarily different, and that applicant did not

³ Serial No. 75673468, filed April 2, 1999.

establish that customers for registrant's air transportation services are sophisticated or knowledgeable enough to be able to distinguish between the similar marks in connection with such closely related services. The Board found, moreover, that registrant's "flightseeing excursions" are not limited or restricted in such a way as to exclude ordinary consumers, and that these services, as identified in the registration, are rendered to the same class of purchasers as applicant's air transportation services, through the same channels of trade. The Board concluded that applicant's mark SUN AIRWAYS so resembles registrant's mark SUN AIR and design in connection with the identified services as to be likely to cause confusion.

A copy of the previous decision is attached herewith.

We now have before us an application for the same mark, the same refusal based on the same registration, partially the same Class 39 services, and, with respect to those services, essentially the same record that was before the Board in the prior case.⁴ We believe the record supports the same result. Moreover, in the present application, the Class 39 services

⁴ It appears that applicant's only additional evidence in the present case is a list, from an unidentified source, of purported marks and associated services which applicant attempted to rely on to further support its contentions regarding the meaning of the word "air." Applicant submitted this list with its request for reconsideration and again with its appeal brief. In her response to the request for reconsideration, the examining attorney correctly objected to this evidence as improper, and we have accordingly given this evidence no consideration.

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include "arranging public charters by plane," services which were not included in the prior application. We find that these services are closely related to, and fully encompass the more narrowly described airplane charter services for government and industrial personnel offered by registrant.

Thus, for the reasons set forth above and in the previous decision, we find that there is a likelihood of confusion in this case between applicant's mark SUN AIRWAYS and registrant's mark SUN AIR and design as applied to the services in Class 39.

We turn then to the additional classes of goods and services identified in the present application. In this regard, applicant essentially argues that there is no likelihood of confusion because the cited mark is not registered for any of the goods or services identified in the application, and because there is no evidence that registrant in fact offers any of those goods or services.

Clearly, each of the goods and services identified in the application is different from the air transportation services offered by the registrant. However, the question is not whether purchasers can differentiate the goods or services, themselves, or whether registrant actually provides any of the identified goods or services, but rather whether purchasers are likely to confuse the source of those goods and services. See, e.g., *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d

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1618 (TTAB 1989). Thus, it is not necessary that the goods and services of the applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods and services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The examining attorney has submitted a number of use-based third-party registrations showing that various airline companies have registered their marks for both air transportation services, including shuttle services, in at least one instance, and one or more of the goods and services identified in each class of the application. For example, U S AIRWAYS is registered for virtually every class and nearly every product and service identified in the application; UNITED AIRLINES is registered for restaurant services, business lounge services for air travelers, printed plastic cards, travel information services and reservation services; BRITISH AIRWAYS is registered for aircraft shuttle services as well as stationery and other printed matter; TRANS WORLD is registered for guidebooks and

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magazines; GETAWAY is registered for credit card services; KLM is registered for providing financing for travel and restaurant services; AIR INDIA is registered for stationery and newsletters concerning travel; EVA AIR is registered for magazines and books sold in the course of transportation services; and CALTRAIN is registered for cups, mugs, dishes, and various items of clothing.

The examining attorney has also submitted selected pages from the websites of a number of air transportation companies. These materials show that, among other products and services, Delta Airlines offers charter flights for corporate passengers and "business-focused" shuttle services as well as magazines, credit cards, a variety of ticket and travel-related services, and branded merchandise "from T-s to mugs"; Korean Air offers airport lounge services; Southwest Airlines offers licensed gift merchandise, t-shirts, caps, and in-flight magazines; and Northwest Airlines offers business charter services in addition to in-flight magazines, branded merchandise, and in-flight shopping.

We find the evidence sufficient to demonstrate that the goods and services identified in the application and registration are of a type which may emanate from a single source. The evidence shows that it is not uncommon for air transportation companies, including companies providing

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corporate charter and shuttle services, to offer collateral goods, and that the goods identified in this application, such as post cards (Class 16), mugs (Class 21), t-shirts (Class 25), cigarette lighters (Class 34), and the like, are among the collateral products those companies typically provide. Thus, it would not be unusual for a company, such as registrant, that provides airplane charter services for government and industrial personnel and air shuttle services for executives to offer such collateral goods as well. Nor would it be unusual for a company offering flightseeing excursions to also offer such collateral goods.

The evidence further shows that applicant is providing services that are normally attendant to the offer of air transportation, such as credit cards for payment of airline tickets (Class 36), travel planning software (Class 9), on board retail services (Class 35), airport lounge facilities (Class 41), and airport restaurant services (Class 42). Applicant itself states that it intends to offer the goods and services identified in classes 9, 16, 21, 25, and 34 "in association with its...air transportation services" and that the services described in Classes 36 and 41 "may be considered incident to airline travel services." (Brief p. 18.)

Moreover, as pointed out in the prior decision, applicant did not establish that customers for registrant's air

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transportation services are sophisticated. However, even assuming they are sophisticated about such services, since the collateral goods and the airline-related services are the kinds of goods and services that may emanate from an airline company, those purchasers would still be likely to assume a connection. Further, to the extent that the collateral items are in the nature of impulse purchases, even those who are discriminating when it comes to hiring a charter service will not exercise the same degree of care in the purchase of such collateral items as t-shirts and matches.

In view of the foregoing, and for the reasons set forth in the previous Board decision, we find that purchasers familiar with registrant's air transportation services offered under its mark SUN AIR and design, upon encountering applicant's substantially similar SUN AIRWAYS mark for a variety of goods and services that are, for the most part, collateral or ancillary to those air transportation services, are likely to believe that those goods and services originate with, or are licensed by or associated with the same entity that provides air transportation services.

Moreover, to the extent that there is any doubt as to the likelihood of confusion, such doubt must be resolved in favor of the registrant and prior user. *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (CCPA 1974).

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Decision: The refusal to register as to all classes is affirmed.

THIS DISPOSITION IS NOT
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OF THE TTAB

Paper No. 21

RFC

Mailed: June 11, 2003

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trafalgar Holdings, Inc.

Serial No. 75/673,468

Jeffrey I. Costellia of Nixon Peabody LLP for Trafalgar Holdings, Inc.

Allison Hall, Trademark Examining Attorney, Law Office 103 (Dan Vavonese, Acting Managing Attorney).

Before Cissel, Seeherman and Chapman, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On April 2, 1999, ADGC Holdings, Inc., a Delaware corporation with its principal place of business in Washington, D.C., filed the above-referenced application to register the mark SUN AIRWAYS on the Principal Register for "transportation of persons, mail and property by air; bonus programs for frequent air travelers, namely, priority boarding check-in, seating and reservation services, ticket upgrades, and augmented frequent flyer mileage; business management consultation services in the field of aircraft

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and airport operations; ticket jackets; corporate documents; and identification tags for luggage." The basis for filing the application was applicant's claim that it had used the mark in connection with the specified goods and services since September 1998, and in interstate commerce in connection with these goods and services since October 1998.

By subsequent amendment, applicant deleted reference to any goods and recited its services as follows:
"transportation of persons, mail and freight by air on regularly scheduled flights over defined routes; air transportation services featuring bonus programs for frequent air travelers, namely, priority boarding, checkin, seating and reservation services, ticket upgrades, and augmented frequent flyer mileage, in International Class 39." Applicant also amended the application to disclaim the descriptive word "AIRWAYS" apart from the mark as shown. The application was assigned to Trafalgar Holdings, Inc. and the assignment was recorded in the United States Patent and Trademark Office.⁵

Following the resolution of a number of other issues, this application is now before the Board on appeal from the Examining Attorney's final refusal to register the mark under Section 2(d) the Lanham Act on the ground that applicant's mark so resembles the mark shown below,

⁵At Reel 1997, Frame 0407.



which is registered⁶ for "airplane and helicopter charter services, namely, providing air transportation for government and industrial personnel and equipment, air shuttle transportation for executives, and flightseeing excursions; flight instruction and training" in International Class 39, that confusion is likely.

Both applicant and the Examining Attorney filed appeal briefs, but applicant did not request an oral hearing before the Board. Accordingly, we have resolved this appeal based on consideration of the application file, the written arguments of applicant and the Examining Attorney and the relevant legal precedents.

The record includes the declaration, with exhibits, of Bruce M. Caner, applicant's Chairman. In his declaration, he contends that in the airline and aviation industry, the term "AIRWAYS" connotes conventional commercial airlines offering regularly scheduled flights over defined routes. He included a copy of dictionary definitions of the word

⁶Reg. No. 2,316,290, issued to Air Aviation Corporation California on February 8, 2000 with a disclaimer of the word "AIR" apart from a mark as shown.

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"airway" as any "company, etc. operating an aircraft, an airline"; and as "the specially marked way or route along which aircraft fly from airport to airport; airline." Also included as an exhibit to his declaration was a copy of an article from the November 13, 1996 edition of The Washington Post. In it, the newspaper discusses USAir's change of its name to "US AIRWAYS." Still other exhibits to his declaration are copies of pages printed from the website of the owner of the cited registration. Based on his experience in the industry and consultation with aviation regulation counsel, Mr. Casner concludes that the light aircraft used for ad hoc charters and the commercial aircraft used for regularly scheduled air transportation are subject to substantially different federal licensing and regulatory requirements; and that based on these facts and the differences between the marks at issue, as well as differences between the services offered thereunder and the consumers and channels of trade for such services, there is no likelihood of confusion between applicant's mark and the cited registered mark.

The Examining Attorney made of record third-party registrations for the marks "KOREAN AIR," "AIR FRANCE," "AIR-INDIA," and "JAPAN AIR SYSTEM," along with advertising materials which show each such mark used to identify the services offered by these airlines; a copy of a page from the website of Air-India indicating that it partners with a number of other air carriers which use the terms "AIR," "AIRWAYS" and "AIRLINES"

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without any apparent distinctions relative to their air transportation services (these airlines include Swiss Air, Austrian Airlines, Air France, Kuwait Airways, and Air Mauritius); a dictionary definition of the term "air" as a reference to "aircraft"; a definition of the word "airway" as an "airline"; a number of additional third-party registrations for marks which include the words "Airways" or "Airlines"; and materials retrieved from Internet websites showing that some airlines, such as Delta and Northwest, also provide charter flight services and shuttle flight services. The Examining Attorney also submitted additional third-party registrations showing that some marks are registered for both air transportation services and various types of bonus programs for frequent flyers.

The predecessor to our primary reviewing court set forth the principal factors to be considered in determining whether confusion is likely in the case of *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression and the relatedness of the goods or services on or in connection with which they are used. Confusion is likely in the case before us because, when considered in their entireties, these marks create similar commercial impressions and the services set forth in the cited registration are closely related to the goods and services specified in the application.

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Turning first to the marks, we note that while they must be considered in their entireties, nevertheless, one feature or part of a mark may be recognized as having a more significant role in creating the commercial impression of the mark, and we may give greater weight to that part or feature in determining whether confusion is likely. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Typically, when a mark consists of a word portion and a design element, the word portion is more likely to be impressed upon the memory of a prospective purchaser and to be recalled and used in calling for or recommending the goods or services. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). For this reason, we may give "SUN AIR," the word portion of the cited registered mark, more weight in determining whether confusion is likely.

In the instant case, these two marks create very similar commercial impressions because each contains the same word, "SUN," combined with either the descriptive word "AIR" or the similarly descriptive word "AIRWAYS," both of which are disclaimed in the cited registration and the application, respectively. Not only are these two words merely descriptive of the services, they are also similar in appearance and pronunciation, and they have virtually identical meanings in connection with these services. The words "SUN AIR" in the cited registered mark clearly play the dominant role in creating the commercial impression that the mark engenders. As is often the case,

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it is the literal portion of the mark, rather than the design component, which is more likely to be recalled by purchasers of the services and used in ordering or recommending them in the future. The design element in the registered mark is plainly a graphic representation of the sun. This redundancy or emphasis on the word "SUN" does little to change the overall commercial impression of the mark as a whole.

Applicant argues that the design element in the cited registered mark allows customers to distinguish easily between the two marks; and that in any event, the connotations and hence the commercial impressions engendered by these marks differ by virtue of the different appearances, pronunciations and connotations of the words "AIR" and "AIRWAYS." Applicant maintains that "AIRWAYS" is used in connection with conventional commercial airlines offering regularly scheduled flights over defined routes, whereas "AIR," when used in connection with air transportation services, implies a small provider of charter flights, flight schools, or a small regional private air carrier, which are apt descriptions of the registrant, according to applicant.

As noted above, both applicant and the Examining Attorney have made of record evidence in support of their respective positions on this issue. The Examining Attorney has shown that the meanings of these terms are virtually synonymous, and that various airlines appear to use the

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terms "AIR," "AIRWAYS" and "AIRLINES" interchangeably. Applicant has introduced evidence tending to show that in at least one instance, "AIR" was intended to create a slightly different connotation from that of "AIRWAYS." On balance, however, we are not persuaded that purchasers of either applicant's air transportation services or the air transportation services specified in the cited registration would necessarily be aware of the subtle distinctions argued by applicant. When considered in their entirety, these marks are similar in appearance, pronunciation, connotation and commercial impression.

We thus turn to consideration of the relationship between the services set forth in the application and the registration, respectively. We find that they are closely related. Contrary to applicant's contention, the customers for these services and the channels of trade through which they are rendered are not necessarily different, nor has applicant established that customers for registrant's air transportation services are sophisticated or knowledgeable enough to be able to distinguish between these similar marks in connection with such closely related services. Applicant's "air transportation services featuring bonus programs for frequent air travelers" appear to be provided to ordinary consumers who travel by air, which class of purchasers would necessarily include executives and government and industrial personnel. These are the same types of people specified in the registration as customers

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for registrant's air charter services. Further, registrant's "flightseeing excursions" are not limited or restricted in such a way as to exclude ordinary consumers. These services, as identified in the registration, are rendered to the same class of purchasers as applicant's air transportation services, through the same channels of trade.

Moreover, the evidence the Examining Attorney made of record shows that airlines transporting people on regularly scheduled flights over defined routes also provide air charter services and air shuttle services, so the purchasing public for these services would reasonably expect a single entity to render both types of air transportation services. Plainly, when these closely related services are rendered under marks such as these, which create very similar commercial impressions, confusion is likely within the meaning of Section 2(d) the Lanham Act.

In any event, any doubt as to the likelihood of confusion must be resolved in favor of the registrant and prior user. *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (CCPA 1974).

DECISION: The refusal to register under Section 2(d) of the Lanham Act is affirmed.