

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

Opposition of Application Serial No. 78/170,846

Target Brands, Inc. ,  
Opposer,  
v.  
Shaun N.G. Hughes,  
Applicant.

Opposition No. 91163556  
CONFIDENTIAL INFORMATION  
REDACTED



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**APPLICANT, SHAUN N.G. HUGHES' MAIN BRIEF ON THE CASE**

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1 **PRELIMINARY STATEMENT**

2 Applicant, Shaun N.G. Hughes, submits this main brief in support of his right to  
3 register the mark ULTIMATE POLO which he has used since 1992 for specialized sun  
4 protective shirts. Hughes seeks registration of application Serial No. 78/170,846 under § 2(f)  
5 of the Trademark Act 15 U.S.C. § 1052 since, as a result of Applicant's long use, sales and  
6 advertising of its sun protective shirts in connection with the mark ULTIMATE POLO, the  
7 trademark has become distinctive of Applicant's specialized shirts.

8 Opposer Target Brands, Inc. ("Target") is not a competitor of Applicant in the  
9 relatively small sun protective clothing market. Target does not sell sun protective shirts and  
10 has no intent to. Target will in no way be damaged by Applicant's registration of the  
11 ULTIMATE POLO mark for "sun protective clothing for men, women and children, namely  
12 shirts". Though Target will not be damaged by Applicant's registration, it opposes based on  
13 the faulty premise that ULTIMATE POLO is a descriptive and laudatory term and thus, "can  
14 be used by anyone". (Opp. BR. p.1.)

15 Applicant does not claim that its registration of ULTIMATE POLO will give it the  
16 right to prevent all others from using the term ultimate polo on all types of clothing items or  
17 that ultimate polo can no longer be used by third parties such as Target in a "fair use"  
18 descriptive sense in connection with conventional garments. McCarthy on Trademarks and  
19 Unfair Competition, §§ 15:06 and 11:45. Applicant does contend, and the evidence of Record  
20 shows, that ULTIMATE POLO has become distinctive of Applicant's specialized shirts in the  
21 sun protective clothing market and that it thus has the right to register the mark to protect its  
22 hard-earned "goodwill" in that narrow market.

23 Target argues that Applicant's evidence of acquired distinctiveness based on its  
24 exclusive and continuous use of the mark ULTIMATE POLO for sun protective shirts in the  
25 sun protective clothing market since 1992, somehow falls short. The argument appears to be  
26 based on the claim that mega-retailer Target sold many times more ultimate polo shirts in  
27 2005, its first year of sale of what it calls its ultimate polo line, than Applicant has sold since

1 it began use of the ULTIMATE POLO mark in 1992. Opposer's brief fails to mention that  
2 Opposer and Applicant sell different goods, operate in two entirely different markets, sell  
3 through different channels of trade and market their goods to customers with entirely different  
4 wants and needs.

### 5 DESCRIPTION OF THE EVIDENCE OF RECORD

6 Applicant has little quarrel with Opposer's description of the evidence of Record other  
7 than that from Applicant's point of view, the documents in Opposer's Appendix are not  
8 believed to be the most significant evidence for the Board to consider. Rather, Applicant's  
9 evidence of long use and sale of sun protective shirts in connection with the mark  
10 ULTIMATE POLO is the most relevant evidence on the issue of the acquired distinctiveness  
11 of the ULTIMATE POLO mark.

### 12 ISSUES PRESENTED

13 The initial issue for the Board is whether Target, which has stipulated that: it does not  
14 assert any exclusive right to use the mark ULTIMATE POLO for sun protective shirts; it does  
15 not sell sun protective clothing in the sun protective clothing market; and, it does not intend  
16 to; and thus, cannot be damaged by Applicant's registration of the ULTIMATE POLO mark,  
17 has the requisite standing to maintain this Opposition.

18 The second issue for the Board is whether Applicant's continuous, exclusive and  
19 substantial use of the trademark ULTIMATE POLO in connection with its specialized sun  
20 protective shirts in the sun protective clothing market since 1992, coupled with its substantial  
21 sales, advertising and promotion of its sun protective shirts under the ULTIMATE POLO  
22 mark, has caused the mark to acquire sufficient distinctiveness in the sun protective clothing  
23 market to support Applicant's registration of the mark.

### 24 STATEMENT OF THE FACTS

#### 25 **A. Applicant's Business.**

26 Applicant Shaun N.G. Hughes is the president of his company, Sun Precautions, Inc.,  
27 a manufacturer of specialized sun protective garments. As a young man, Mr. Hughes was

1 stricken with skin cancer and, as a result, became sensitive to the needs of many for garments  
2 which provide protection against the harmful rays of the sun over extended periods and to a  
3 much higher degree than conventional clothing or sunblocks.<sup>1</sup> Mr. Hughes developed and  
4 patented a unique process for treating fabric to make it highly effective in blocking the  
5 harmful UV rays of the sun. Mr. Hughes named this fabric SOLUMBRA® and obtained U.S.  
6 Patent No. 5,414,913 issued May 16, 1995. (App. 2291-94) (Stip. 62).

7 As a melanoma survivor, Mr. Hughes created Sun Precautions, Inc. to manufacture  
8 and sell sun protective garments to those, like himself, who for health or medical reasons  
9 desire to avoid the harmful effects of the sun. The front page of each of Applicant's catalogs  
10 bears the tag-line "Medical Solutions for Sun Sensitive and Sun Sensible People". (Stip. 63).  
11 Applicant's sun protective garments provide 30+ SPF protection and are designed for use by  
12 medically sun sensitive people. (Stip. 82). Applicant's catalogs are specifically targeted  
13 towards sun sensitive people rather than the ordinary consumer. (Stip. 83).

14 Each of Applicant's catalogs includes one or more opening pages explaining the ability  
15 of Applicant's clothing to provide a high degree of sun protection as well as explaining the  
16 dangers of sun exposure. (See APP. 338-346, for example).

17 Applicant's SOLUMBRA® clothing, of which ULTIMATE POLO is one brand,  
18 (Stip. 62), has been reviewed and cleared by the FDA as a medical device. (APP. 346).  
19 Dermatologists and doctors recommend and purchase sun protective garments made with  
20 SOLUMBRA®. (See APP. 442, for example). The American Academy of Dermatologists  
21 has recognized Sun Precautions for its work in skin cancer prevention by awarding it its Gold  
22 Triangle Award in 1997. (Stip. 61).

23  
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25  
26 <sup>1</sup> Applicant's stipulated exhibits in the Record include selected pages from each of Applicant's catalogs  
27 showing the catalog covers and the pertinent pages offering ULTIMATE POLO brand shirts. See APP. 004  
through APP. 164, chronologically from 2005 back to 1992. The Record also includes complete copies of  
Applicant's catalogs, at APP. 194 through 1506, again chronologically from 2005 backward.

1 Applicant sells its sun protective garments including its ULTIMATE POLO brand  
2 shirts in the sun protective clothing market to individuals who have a special need for, and  
3 recognize the importance of, sun protective garments. The sun protective clothing market is a  
4 distinct market in which products specially designed to reduce a wearer's exposure to the sun  
5 are offered for sale. (Stip. 84) Applicant's competitors in the sun protective clothing market  
6 are companies specializing in garments designed to reduce a wearer's exposure to the sun and  
7 include:

8 Shady Lady Products, LLC  
9 Mechanicsville, PA 18934

10 Coolibar  
11 Minneapolis, MN 55426

12 Solar Eclipse  
13 Scottsdale, AZ 85254

14 Cabana Life  
15 New York, NY 10011

16 Solartex Sun Gear  
17 Richmond, VA 23235

18 (Stip. 5). Applicant's trademarks such as ULTIMATE POLO are critical to distinguishing its  
19 products from those of its competitors in the sun protective clothing market.

20 In comparison to Opposer Target Brands, Applicant and its competitors are very small  
21 companies competing to sell specialized garments in a specialized market to customers with a  
22 specialized need.

23 **B. Applicant's Use of the Trademark ULTIMATE POLO.**

24 Applicant has been using the trademark ULTIMATE POLO in connection with sun  
25 protective shirts since at least as early as June 30, 1992. (Stip. 1). Applicant uses the mark on  
26 hang-tags which are affixed to its shirts. (APP. 002 and 003). Applicant also uses the mark at  
27 the principal point of sale of its garments; namely, in its catalogs adjacent pictures of the  
ULTIMATE POLO shirts. The catalogs include sizing information and the price of the shirt.

1 (Stip. 3 and APP. 164 and 1317, for example and in all other catalogs), as well as order forms.  
2 The catalogs are offers to sell the ULTIMATE POLO brand shirts and all information  
3 necessary to make the decision to and complete the purchase of the shirts is present.

4 Besides use of the mark ULTIMATE POLO on hang-tags and in its catalogs,  
5 Applicant also uses the mark on its Website, again adjacent offers to sell the ULTIMATE  
6 POLO shirts. (See APP. 166-169).

7 From 1996 through 2005, Applicant publicly distributed a total of [REDACTED]<sup>2</sup>  
8 copies of its catalogs, each of which included offers to sell Applicant's ULTIMATE POLO  
9 brand shirts. (Confidential Stip. 1). Applicant's expenditures in producing and distributing its  
10 catalogs from 1996 through 2005 totaled [REDACTED]. (Confidential Stip. 2).

11 The Sun Precaution's Website which offers the ULTIMATE POLO shirts for sale, is  
12 visited on the average of [REDACTED] times per month and, the average length of visit is  
13 [REDACTED]. (Confidential Stip. 3). APP. 170 is an accurate summary of Applicant's  
14 catalog distribution totals from 1996 through 2005; Applicant's total catalog advertising  
15 expenses for those same years, and, Applicant's Website visit information. (Confidential  
16 Stip. 4, APP. 170).

17 From 1993 through 2005, Applicant sold [REDACTED] Dollars of ULTIMATE  
18 POLO brand sun protective shirts. (Confidential Stip. 5). APP. 171 is an accurate summary  
19 of Applicant's annual dollar sales of its ULTIMATE POLO brand shirts. (Stip. 6, APP. 171).  
20 From 1993 through 2005, Applicant sold a total of [REDACTED] ULTIMATE POLO brand  
21 shirts. APP. 172 is an accurate summary of Applicant's annual unit sales of ULTIMATE  
22 POLO shirts from 1993 through 2005. (Confidential Stips. 7 and 8, APP. 172).

23  
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27 <sup>2</sup> See Applicant's Confidential Brief submitted herewith containing unredacted copies of all pages bearing confidential material and the Confidential Stipulations of the parties.

1 Applicant's principal channel of trade through which it sells its sun protective  
2 garments in connection with the mark ULTIMATE POLO is direct marketing through its  
3 catalogs. Applicant's catalogs all include the term ULTIMATE POLO positioned adjacent to  
4 a picture of the shirt, size information, color information and pricing information. The  
5 catalogs also include information on how to purchase the garments and an order form.  
6 Applicant also opened and continues to operate retail stores in Seattle, Washington since  
7 1992; in San Diego, California since 1998; and in Santa Monica, California since 2001.  
8 Applicant also sold its clothing through a store in Hawaii from 1996 to 2004. Applicant's  
9 ULTIMATE POLO brand shirts are sold in all of Applicant's stores. Applicant also markets  
10 over the Internet through its Sun Precautions Website www.sunprecautions.com. (Stip. 53).  
11 Applicant's Website first went up on the Internet at least as early as August 1995, and has  
12 been available on the Internet at all times since then. At all times since August 1995,  
13 Applicant's ULTIMATE POLO brand shirts have been offered for sale on Applicant's  
14 Website. (Stip. 54).

### 15 ARGUMENT

#### 16 **A. Opposer Has No Real Interest in this Case and Has No Standing to Oppose.**

17 The standard for bringing an Opposition at the pleading stage requires only a "belief"  
18 in possible damage arising from a registration (15 U.S.C. § 1063). At final decision,  
19 allegations in support of standing which may be sufficient for pleading purposes, must be  
20 affirmatively proved by the plaintiff. *Ritchie v. Simpson*, 170 F.3d 1092, 50 U.S.P.Q.2d 1023,  
21 1029 (Fed. Cir. 1999). At final decision, the inquiry is not whether pleading of standing is  
22 sufficient, but whether the allegations have been proven. *Boswell v. Mavety Media Group,*  
23 *Ltd.*, 52 U.S.P.Q.2d 1600, 1605 (TTAB 1999). While there is no requirement that actual  
24 damage be proven, there is a requirement that an opposer have a "real interest" in the case,  
25 i.e., a personal interest in the outcome of the proceeding and a reasonable basis for belief in  
26 damage. See *Ritchie v. Simpson* (Supra at 1025) and TBMP § 309.03(b).

1 In this case, Target has proved no basis for believing it will be damaged by Applicant's  
2 registration of the mark ULTIMATE POLO for its sun protective shirts.

3 The record is clear that Target has not used and does not intend to use ultimate polo as  
4 a trademark. (Stip. 65). Target has not and does not intend to sell sun protective clothing for  
5 men, women and children, namely shirts, in connection with the words ultimate polo.  
6 (Stip. 73). Target does not characterize its clothing as being specifically adapted to provide  
7 protection from the sun. (Stip. 74). Target has not and does not intend to market clothing in  
8 connection with the words ultimate polo to customers specifically seeking sun protective  
9 clothing. (Stip. 75). In addition, Applicant has not asserted and does not believe that Target's  
10 descriptive use of ultimate polo in connection with its conventional garments is likely to cause  
11 confusion or damage Applicant.

12 Based on the stipulated facts, there is no possible way that Opposer could be damaged,  
13 or even believe it would be damaged, by the registration of Applicant's ULTIMATE POLO  
14 trademark for its specialized sun protective shirts.

15 In its brief at page 4, Target asserts standing by first explaining the relationship  
16 between Target Corporation and Target Brands, Inc., an irrelevancy since Applicant does not  
17 contend that the trademark holding company, Target Brands, Inc. is not in privity with the  
18 operating company, Target Corporation. On the key issue of Opposer's proof of a belief in  
19 damage, and thus standing, however, Opposer merely quotes 15 U.S.C. § 1063 concerning the  
20 right to "bring" an opposition, i.e., that it "believes" it will be damaged, but offers no proof  
21 which supports the reasonableness of such a belief, as is its burden at trial. See *Ritchie v.*  
22 *Simpson*, Supra. Opposer also quotes from *Jewelers Vigilance Committee, Inc. v. Ullenberg*  
23 *Corp.*, 823 F.2d 490, 2 U.S.P.Q.2d 2021 (Fed. Cir. 1987) to the effect that where an  
24 opposition is based on descriptiveness, an opposer "need only assert an equal right to use the  
25 mark for the goods." (Emphasis added). Opposer, however, makes no claim to a right, or  
26 even a desire, to use Applicant's ULTIMATE POLO mark for Applicant's goods "sun  
27 protective clothing for men, women and children, namely shirts."

1           Opposer has totally failed to carry its burden of proving any possibility of damage  
2 such as would support this Opposition, and judgment should be entered in Applicant's favor  
3 on this basis alone.

4 **B.     ULTIMATE POLO Has Acquired Distinctiveness for Applicant's Sun Protective**  
5 **Shirts.**

6           At the time it filed its application, Applicant asserted a claim of acquired  
7 distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). In an office  
8 action, dated April 2, 2003, the Examining Attorney required that Applicant clarify the scope  
9 of its Section 2(f) claim, stating that the term "polo" is generic for a type of shirt and that  
10 generic terms cannot acquire distinctiveness.

11           In a response filed August 28, 2003, Applicant clarified that its Section 2(f) claim was  
12 made to its entire trademark "ULTIMATE POLO" and not to the word "polo" alone; and,  
13 pointed out that Applicant's continuous use of the term "ULTIMATE POLO" for more than  
14 twelve years has caused consumers to associate the trademark ULTIMATE POLO with  
15 applicant and its claimed products, namely, "sun protective clothing for men, women and  
16 children, namely shirts." The Examining Attorney agreed and the application was passed to  
17 publication.

18           In response to the present Opposition, Applicant has submitted evidence supporting its  
19 claim of acquired distinctiveness for its sun protective shirts, including: copies of each of its  
20 catalogs distributed from 1992 through 2005, which show long continuous and proper  
21 trademark use of the ULTIMATE POLO mark; the total number of catalogs distributed,  
22 which confirm that Applicant's use of the mark has been very substantial; its expenditures in  
23 producing and distributing its catalogs; and, its sales figures for ULTIMATE POLO brand sun  
24 protective shirts, both in dollars and units, which evidence the fact that consumers in the  
25 relevant marketplace recognize and associate the ULTIMATE POLO mark with Applicant  
26 and its products.  
27

1 Secondary meaning may be proven by a fair preponderance of the evidence of an  
2 association between the mark and the seller in the minds of a substantial number of the  
3 relevant buyer group. *National Shoe Stores Co. v. National Shoes of New York, Inc.*,  
4 113 U.S.P.Q. 380 (1957) (Emphasis added); McCarthy §15:33. That is, if it is "more likely  
5 than not" that a term has acquired secondary meaning, it is a sufficient finding to support the  
6 legal conclusion that secondary meaning exists. *W.E. Bassett Co. v. Revlon, Inc.*,  
7 168 U.S.P.Q.1 at 4 (2d Cir. 1970).

8 While Applicant's principal channel of trade through which it sells its sun protective  
9 shirts in connection with the mark ULTIMATE POLO is direct marketing through its  
10 catalogs, Applicant has also submitted statistics relating to its Website upon which  
11 ULTIMATE POLO sun protective shirts have been continually offered for sale since 1995.  
12 (Stip. 54). App. 166-169 are print-outs from Applicant's Website showing the offering of  
13 Applicant's sun protective shirts in connection with the mark ULTIMATE POLO. (Stip. 55).

14 Applicant has also submitted evidence showing the lengthy store sales of its products  
15 in Seattle, Washington, San Diego, California, Santa Monica, California, and Hawaii.  
16 Applicant's ULTIMATE POLO brand sun protective shirts are sold in all of Applicant's  
17 stores. (Stip. 53).

18 Applicant has submitted evidence showing the recognition and discussion of  
19 ULTIMATE POLO brand products in the press. See Stip. 58 and 59 and App. 174-180. The  
20 evidence also confirms the recognition and effectiveness of the sun protective features of  
21 Applicant's products, including the ULTIMATE POLO shirt, in that they are offered for sale  
22 through many physician's offices as well as The John Wayne Cancer Center in California and  
23 The Mayo Clinic in Minnesota. App. 179. Further, The American Academy of Dermatology  
24 has recognized Applicant for its work in skin cancer prevention. (Stip. 61).

25 Applicant respectfully submits that Applicant's continuous and substantial use of the  
26 ULTIMATE POLO mark to identify its sun protective shirts for more than fourteen years is  
27 compelling evidence of acquired distinctiveness.

1 Opposer has submitted evidence that "ultimate polo" is used in connection with  
2 conventional clothing not only by itself, but by its competitors in the mass retail market. Such  
3 evidence, however, is of minimal relevance here since it relates to sales of products  
4 substantially different from those sold by Applicant in markets far removed from the  
5 specialized sun protective garment market in which Applicant operates. The sun protective  
6 clothing market is a distinct market in which products specially designed to reduce a wearer's  
7 exposure to the sun, are offered for sale. (Stip. 84). Applicant's ULTIMATE POLO brand  
8 sun protective shirts are made of its unique and patented SOLUMBRA® fabric (U.S. Pat.  
9 No. 5,414,913), provide 30-plus SPF protection and are designed specifically for use by  
10 medically sun sensitive people. (Stip. 62 and 82). Review of Applicant's catalogs shows that  
11 they are specifically targeted toward sun sensitive people rather than the ordinary consumer in  
12 the mass market. (Stip. 83).

13 Secondary meaning need not be proven among the general public if a product is  
14 targeted at only a segment of the general public. *McCarthy* (Supra) at 15:46. Applicant does  
15 not target the general public, but rather the relatively small segment of consumers willing to  
16 pay a premium for specialized sun protective garments. This is significant in that the quantity  
17 of advertising and sales of sun protective shirts under the ULTIMATE POLO mark needed to  
18 acquire secondary meaning in the relevant sun protective clothing market can be significantly  
19 smaller than would be needed to acquire distinctiveness in the total general public market.  
20 Target's criticism of the quantity of Applicant's evidence by comparing it to its own sales to  
21 the general public is not well founded.

22 It is the association in the mind of a prospective buyer, at the time when he or she  
23 considers a purchase, which is the real issue; not merely what a casual and disinterested  
24 potential consumer thinks. *American League Works, Inc. v. United States Trunk Co.* 116  
25 U.S.P.Q. 188 (D. Mass. 1957); Supp. Opinion 117 U.S.P.Q. 83 (D. Mass. 1957); *aff'd.*, 1180  
26 U.S.P.Q. 424 (1st Cir. 1958). This is the precise focus of Applicant's catalog use of the  
27 ULTIMATE POLO mark.

1 Referring by random example to App. 788-835, one of Applicant's catalogs distributed  
2 in the year 2000, (Stip. 28), the second page of the catalog shows Applicant Shaun Hughes  
3 wearing a sun protective shirt and holding a golf club adjacent the statement, "Using the right  
4 sun protection allows me to spend time doing the things I enjoy most". (App. 789). Page 3 of  
5 the catalog is a message from Mr. Hughes stressing the medical benefits of the use of sun  
6 protective garments and the uniqueness of the sun protective garments sold by Applicant to  
7 sun sensitive people.

8 Pages 4-7 of the catalog, App. 791-795, comprise an informative message about the  
9 harmful effects of UV rays and why neither conventional summer clothing nor sunscreens  
10 provide adequate protection. Pages 8 and 9 (App. 795, 796) set forth additional reasons why  
11 Applicant's products provide sun protection. Finally, page 10 (App. 797) sets forth a  
12 testimonial from satisfied users of Applicant's sun protective products.

13 It is not until page 11 of the catalog (App. 798) that the first of Applicant's garments is  
14 offered for sale. Thus, the first ten pages of Applicant's catalog are specifically designed to  
15 explain the need for and benefits of sun protective clothing. Applicant's catalogs have  
16 consistently followed this format and stressed the sun protective nature of Applicant's  
17 products, thus distinguishing them from conventional clothing of the type sold by Target.  
18 Applicant's marketing approach is a far cry from the manner in which Target offers its  
19 conventional clothing products in the mass market.

20 Target's Opposition totally ignores the critical differences between Applicant's sun  
21 protective garments and its own conventional garments, as well as the specialized nature of  
22 the sun protective clothing market as compared to the mass market in which Target operates.

23 Applicant's substantial and continuous use of the ULTIMATE POLO mark to identify  
24 the source of its specialized sun protective shirts has created substantial recognition and  
25 goodwill in the minds of sun sensitive consumers who pay a premium to purchase sun  
26 protective clothing such as the ULTIMATE POLO brand shirt.

1 Opposer cites a number of cases where acquired distinctiveness was not found, but  
2 these are of little precedential relevance since acquired distinctiveness is a fact question which  
3 must be decided after analysis of all of the relevant facts of the particular case in question.  
4 Applicant's sales and advertising expenditures although small when compared to Target's  
5 sales of conventional garments in the mass market, are substantial in the relatively small sun  
6 protective clothing market. Target claims there are numerous other users of ultimate polo in  
7 the mass market, but such descriptive uses in connection with non-sun protective garments are  
8 of little relevance here. At the time Applicant filed its application in 2002, there were no  
9 Federal registrations or pending applications to register Ultimate Polo. (Stip. 60).

10 Opposer criticizes the manner in which Applicant uses its ULTIMATE POLO brand  
11 trademark in connection with its sun protective shirts, but the simple fact is that Applicant's  
12 usage is proper trademark use as recognized by the Trademark Office and the Courts.

13 At page 14 of the above discussed catalog, (App. 801), Applicant's ULTIMATE  
14 POLO brand shirt is offered for sale. The ULTIMATE POLO mark is placed immediately  
15 adjacent a photograph of Applicant's shirt. The technical features of the shirt which make it  
16 sun protective and yet cool to wear, are also described. Finally, the price of the shirt, \$74.95  
17 (a price far higher than the price of Target's shirts) (see T-000001), is set out adjacent sizing  
18 and color information. Pages 45-47 of the catalog (App. 831-834), set forth "How to Buy"  
19 information, including an order form. The use of Applicant's trademark in its catalogs at the  
20 point of purchase of the ULTIMATE POLO shirts has long been recognized as proper  
21 trademark usage as a display associated with the goods. *Land's End Inc. v. Manbeck*, 797  
22 F. Supp. 511, 24 U.S.P.Q.2d 1314 (E.D. Va. 1992) and TMEP 904.06(a). Applicant also  
23 places the ULTIMATE POLO mark on hangtags distributed with its ULTIMATE POLO  
24 brand shirts. (Stips. 3 and 5).

1 CONCLUSION

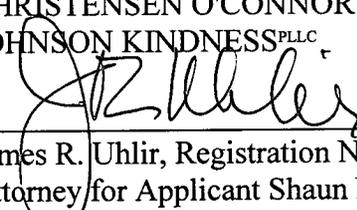
2 Reviewing Opposer's brief and the evidence of Record, it is difficult to understand  
3 why Opposer has seen fit to pursue this Opposition. Applicant's evidence shows substantial  
4 and continuous sales and advertising of its ULTIMATE POLO brand sun protective shirts for  
5 more than 14 years to a very specific group of consumers. The inference to be drawn can  
6 only be that it is more likely than not that the wide exposure of Applicant's mark to the  
7 specific, motivated consumers of sun protective garments has created secondary meaning in  
8 the ULTIMATE POLO mark in the sun protective clothing marketplace.

9 Applicant sells different, non-competitive garments in a totally different market from  
10 that in which Opposer operates. Applicant has not threatened Opposer with infringement of  
11 its ULTIMATE POLO mark since Applicant does not believe it is being damaged by  
12 Opposer's current activities and, indeed, the evidence of Record makes it apparent that  
13 Opposer itself will not be damaged by Applicant's registration of the ULTIMATE POLO  
14 mark for "sun protective garments for men, women and children, namely shirts. "

15 Applicant has shown substantial evidence of acquired distinctiveness in the sun  
16 protective clothing market for its ULTIMATE POLO brand sun protective shirts and, based  
17 on all of the above, Applicant submits that this Opposition should be dismissed and  
18 Applicant's application passed to registration.

19 Dated: January 12, 2007

20 CHRISTENSEN O'CONNOR  
21 JOHNSON KINDNESS<sup>PLLC</sup>

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24 James R. Uhlir, Registration No.25,096  
25 Attorney for Applicant Shaun N.G. Hughes  
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CERTIFICATE OF FILING

I hereby certify that this redacted version of Applicant, Shaun N.G. Hughes' Main Brief on the Case is being deposited with the U.S. Postal Service in a sealed envelope as first class mail with postage thereon fully prepaid and addressed to the Trademark Trial and Appeal Board, U.S. Patent and Trademark Office, P.O. Box 1451, Alexandria, VA 22313-1451, on the below date.

Date: January 12, 2007



CERTIFICATE OF SERVICE

I hereby certify that on the 12<sup>th</sup> day of January, 2007, a true copy of the redacted version of Applicant, Shaun N.G. Hughes' Main Brief on the Case was served via electronic mail to Opposer's attorneys as listed below.

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