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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

AMENDED NOTICE OF OPPOSITION

Opposer The Corps Group, a Pennsylvania company, with a principal place of business located at 258 N. West End Boulevard, #318, Quakertown, Pennsylvania 18951, believes that it will be damaged if the mark in Application Serial No. 85-094,889 is registered and hereby opposes the same under 15 U.S.C. § 1063.

The name and address of the Applicant for Application Serial No. 85-094,889 is Afterburner, Inc., a Georgia company with a principal place of business located at 55 Ivan Allen Jr. Boulevard, Suite 525, Atlanta, Georgia 30308.

As grounds for cancellation, The Corps Group alleges as follows:

- 1. Afterburner has applied for a registration of a mark consisting of a three-dimensional depiction of an entire pilot flight suit (the "alleged mark") as worn by Afterburner's employees and contractors in rendering Applicant's services. The alleged mark does not contain any distinctive designs or patterns on the flight suit. Rather, the alleged mark is simply a generic flight suit.
 - 2. Afterburner defines its claimed use of the mark as being in connection with

the provision of "business management consultancy services, executive search and placement services, [and] personnel placement and recruitment," as well as "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."

- 3. In the application, Afterburner alleges that it first used the alleged mark m commerce on January 31, 1996.
- 4. The application is based on a claim that the alleged mark has acquired distinctiveness for use in association with Afterburner's services in commerce under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f).
- 5. Like Afterburner, The Corps Group is in the business of "corporate team building" and is comprised of former U.S. military fighter pilots who draw on their military training and experience to perform at speaking engagements and conduct training for business clients. The Corps Group describes on its web site that "through keynote addresses, corporate team building events and executive leadership training, [it] can help your business develop a high performing team culture that generates and maintains superior, measurable results."
- 6. The Corps Group has used flight suits in the course of advertising and making corporate team building presentations for an extended period of time. When making presentations, the individual employees of The Corps Group display logos, titles and headings making it clear that they are with The Corps Group. The Corps Group employees make this point clear whether they are wearing a flight suit or business attire.
 - 7. The Corps Group is not unique in using flight suits to make presentations to

business clients. Various entities, including numerous famous military heroes, have been doing so for decades. The following is a non-exclusive list of individuals and entities who have implemented the same basic idea: Mach 2 Consulting, Bright Consulting Group, Mission Excellence, Check Six, Fighter Pilots USA, Top Gun Teambuilding, Target Leadership, Christian Fighter Pilots, Brian Shul Presentations, Rob "Waldo" Waldman, Ed Rush, John Foley, Vernice Armour, Eileen Collins, Jon McBride, Jeff Espenship, Dan Clark, Bob Shaw, Pete Ross, Mike Heavey, Bill Simmons, Justin Hughes, Martin Richard, Rick White, and Scott O'Grady. Screenshots of some of the web sites for the individuals and entities in the business are attached hereto as Exhibit A.

- 8. In fact, the principal of Mach 2 Consulting Anthony "AB" Bourke is a former partner of Afterburner. Espenship, Waldman, White, and the founders of Check Six were also formerly affiliated with Afterburner.
- 9. Practically all of the other entities in the fighter pilot team building business seminar arena utilize flight suits in advertising their services and/or making presentations in which they reference their histories as fighter pilots and use call-signs and military jargon to lead team building seminars for business clients.
- 10. As such, the alleged mark is not distinctive in any way. Rather, it represents the use of a common, well-known uniform by a fraternity of fighter pilots working for themselves and numerous entities.
- 11. The other entities listed above have been using flight suit motifs in advertising and making team building seminars for years. Additionally, one or more other entities have been making such presentations in geographic areas that Afterburner has not penetrated.

- 12. The Corps Group is likely to be damaged by the registration of the alleged mark in that the prima facie effect of such registration would impair The Corps Group's right to have its key employees all of whom are former fighter pilots make presentations in flight suits. Likewise, numerous other veterans a number of whom attained a significant degree of notoriety by virtue of their service would face the prospect of similar damage if the alleged mark were registered.
- 13. In fact, if the alleged mark is registered, then The Corps Group is even faced with the prospect of its employees and contractors not being able to appear in pictures on the company's web site wearing the flight suits that they wore when they served in the armed forces. The alleged mark is so generic and broad that it would arguably prevent even that basic form of commercial expression on the part of The Corps Group and many other veterans.
- 14. Afterburner filed a complaint in the Superior Court of Forsyth County, Georgia in October 2009 alleging, among other claims, that The Corps Group and its employees infringed its trade dress based in part on wearing military flight suits while they made presentations that Afterburner claimed was likely to cause confusion with Afterburner's military flight suit, which is the subject of Application Serial No. 85-094,889.
- 15. The Forsyth County Superior Court held a seven day jury trial in April 2014. 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. Initially, the court denied the motion for directed verdict.
 - 16. At the close of all evidence, The Corp Group and the other defendants renewed

their motion for directed verdict on the claim for infringement of Afterburner's flight suit design. The Corps Group and the other defendants argued that Afterburner's alleged flight suit service mark was generic and unprotectable, citing evidence of third parties who wore flight suits when making presentations and the lack of evidence that anyone identified Afterburner as the source of a "generic" unmarked flight suit.

17. The court granted the motion for directed verdict, holding that the purported service mark was "a generic flight suit" and "not a service mark." Afterburner did not move for reconsideration and did not appeal the judge's ruling.

Grounds for Opposition - The Alleged Mark Is Not Capable of Distinguishing Afterburner's Services

- 18. As a matter of law, the alleged mark is not entitled to protection as a matter of law because it is not capable of distinguishing Afterburner's services.
- 19. The Corps Group and numerous other entities use motifs similar to that of the alleged mark and have done so for years. There is nothing unique or distinctive about the basic use of a non-descript flight suit in advertising and making a presentation to a business client. The concept should not be exclusively appropriated by any company.

Grounds for Opposition - The Alleged Mark Has Not Acquired Distinctiveness

- 20. As a matter of law, the alleged mark is not inherently distinctive and therefore is not registrable in the absence of proof of acquired distinctiveness.
- 21. Afterburner does not and indeed cannot submit evidence in support of its application that the alleged mark the simple use of an unmarked flight suit in corporate team building presentations has acquired distinctiveness as a trademark. Specifically, Afterburner cannot meet its substantial burden of showing that the use of unmarked flight

suits in corporate team building presentations has acquired distinctiveness as a symbol of Afterburner's services in commerce.

- 22. Afterburner is not the sole and exclusive user of the alleged mark for use in association with corporate team building presentations. The alleged mark does not function to identify Afterburner's services and distinguish them from identical, similar, or related services offered by The Corps Group or numerous other entities in the business of making corporate team building presentations.
- 23. Afterburner is not entitled to register the alleged mark because the alleged mark is not distinctive. Therefore, Afterburner is not entitled to exclusive use of the alleged mark in commerce.

<u>Grounds for Opposition - Others Have Used The Alleged Mark Before It Acquired</u> <u>Distinctiveness</u>

- 24. The Corps Group denies that Afterburner's alleged mark has acquired secondary meaning. However, to the extent that it has done so, it acquired secondary meaning after numerous other entities had started advertising and making corporate team building presentations using flight suits.
- 25. Many other entities have been advertising and making corporate teambuilding presentations using flight suits for years.

<u>Grounds for Opposition - Others Have Used The Alleged Mark In Geographic Areas</u> <u>Where Afterburner Has Not Acquired Distinctiveness</u>

26. The Corps Group denies that Afterburner's alleged mark has acquired secondary meaning anywhere. However, to the extent that it has done so, it has not acquired secondary meaning throughout the United States.

27. One or more entities have been advertising and making corporate teambuilding presentations using flight suits in geographic areas where Afterburner has a limited presence and therefore has not acquired secondary meaning.

Grounds for Opposition — Collateral Estoppel

- 28. The identical issue of whether the purported mark that is the subject of Application Serial No. 85-094,889 is protectable as a trademark was involved in the civil action in Forsyth County Superior Court.
- 29. The identical issue of whether the purported mark that is the subject of Application Serial No. 85-094,889 is protectable as a trademark was actually litigated in the civil action in Forsyth County Superior Court and the court determined that the purported mark was not protectable as a trademark.
- 30. The determination that the purported mark that is the subject of Application Serial No. 85-094,889 is not protectable as a trademark was necessary to the resulting judgment.
- 31. Afterburner had a full and fair opportunity to litigate the issue in the civil action in Forsyth County Superior Court.
- 32. As a result, Afterburner is estopped from arguing that the purported mark that is the subject of Application Serial No. 85-094,889 is protectable as a trademark.

WHEREFORE, Opposer The Corps Group requests that its Opposition to Application Serial No. 85-094,889 be sustained and that the Trademark Trial and Appeal

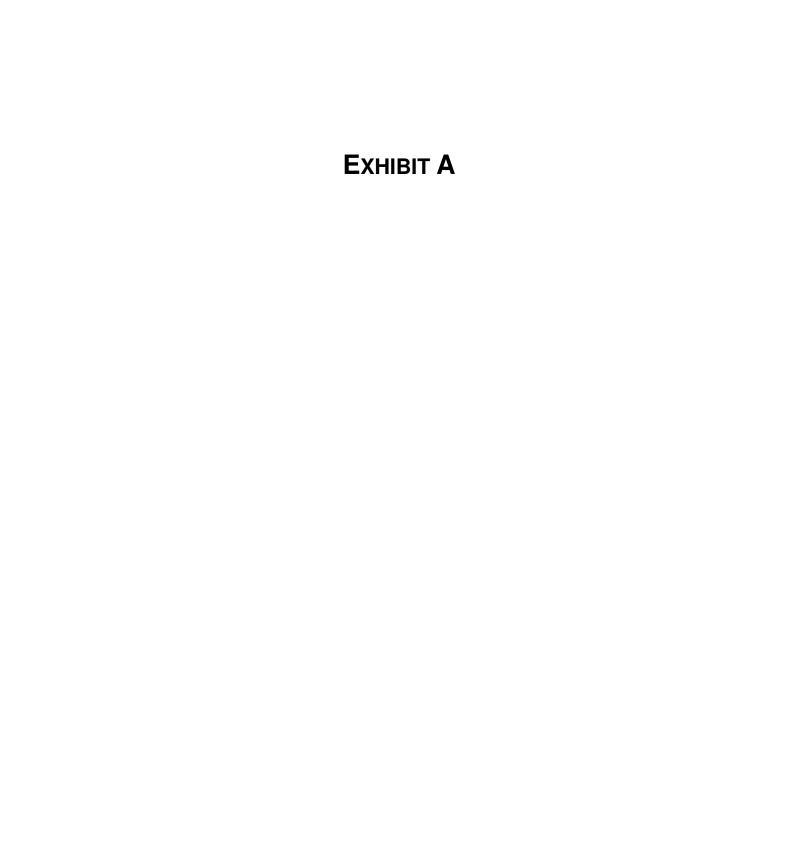
Board grant any and all further relief to The Corps Group that the Board finds necessary and just under the circumstances.

Dated: August 25, 2017 Respectfully submitted,

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

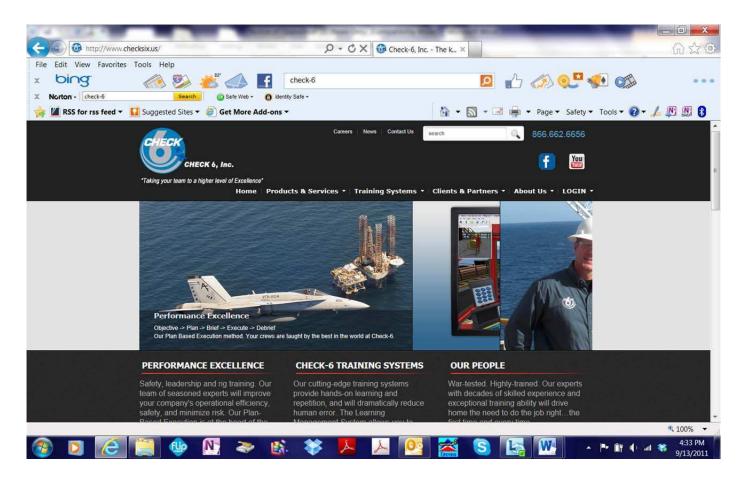
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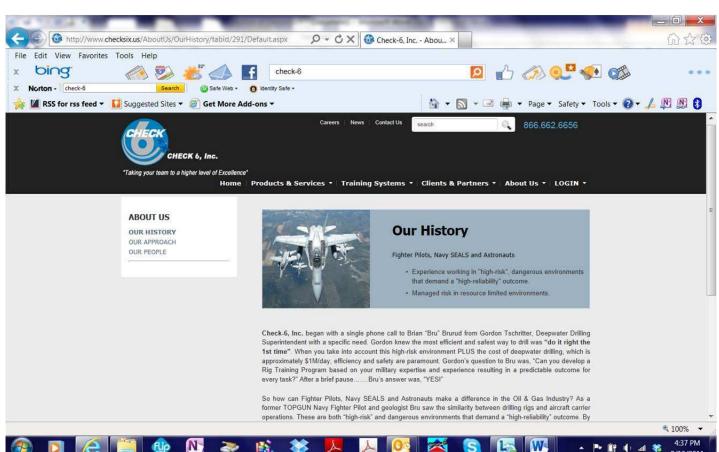
Attorneys for Opposer The Corps Group

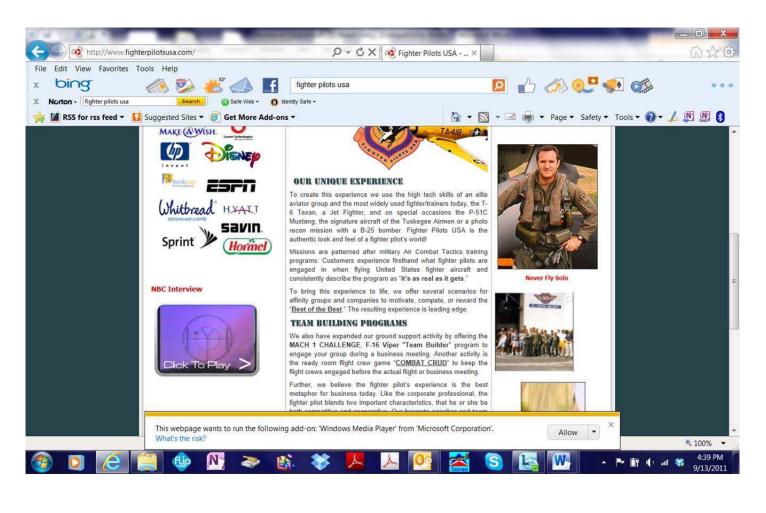


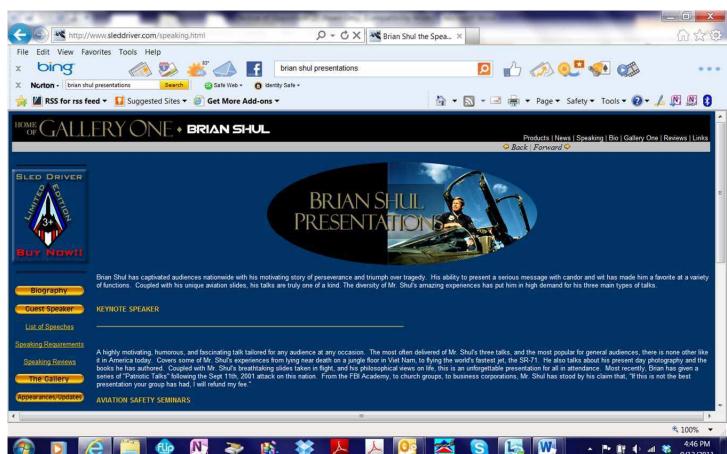


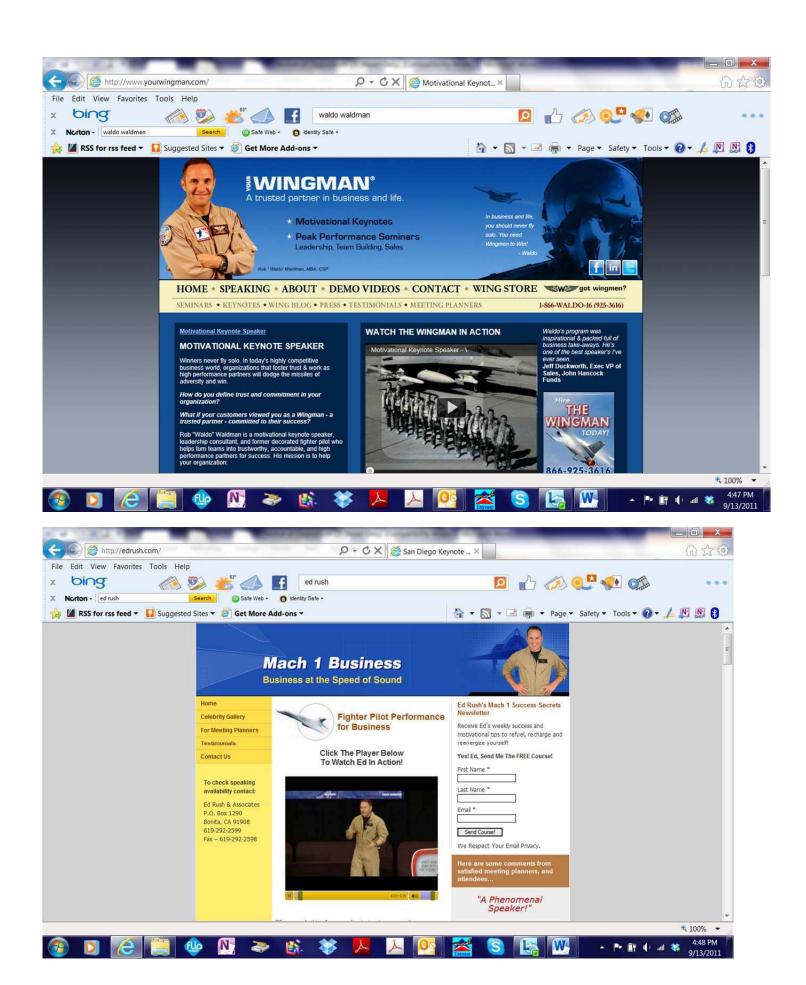


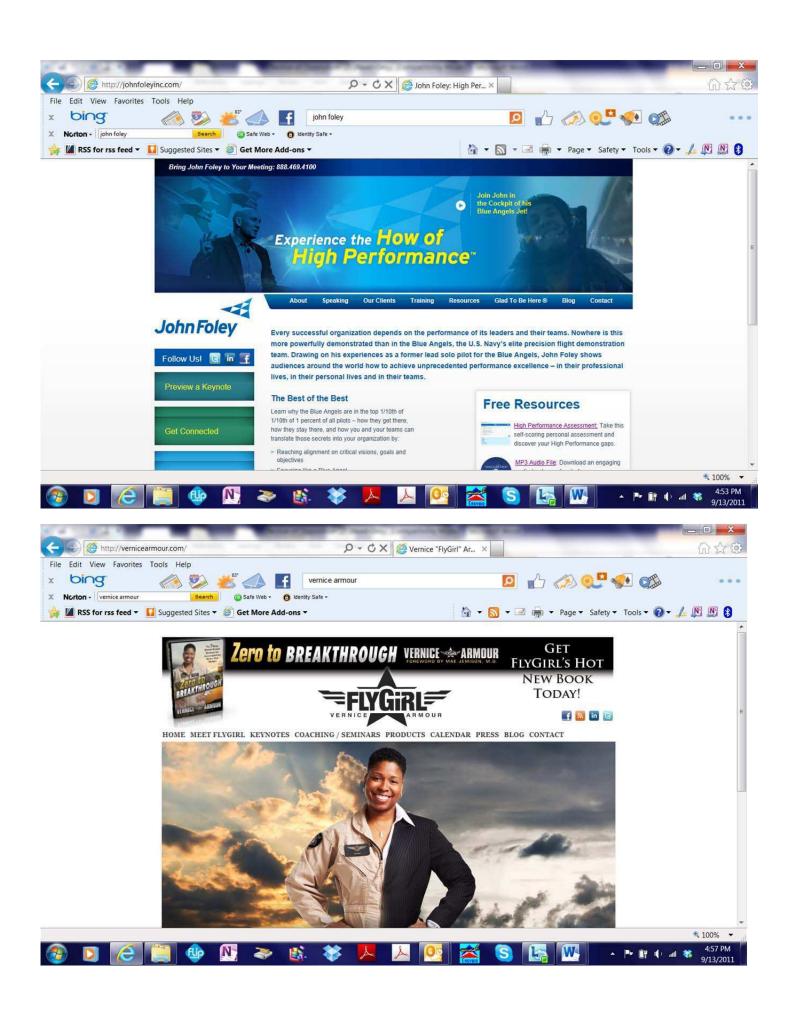




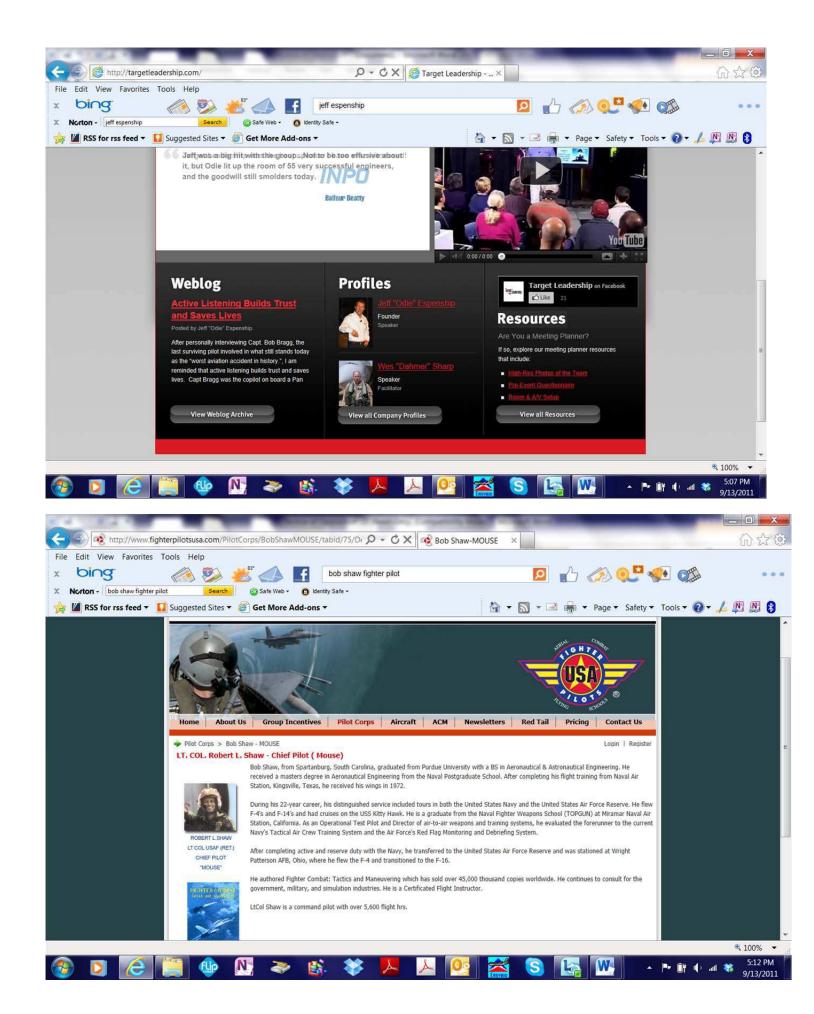


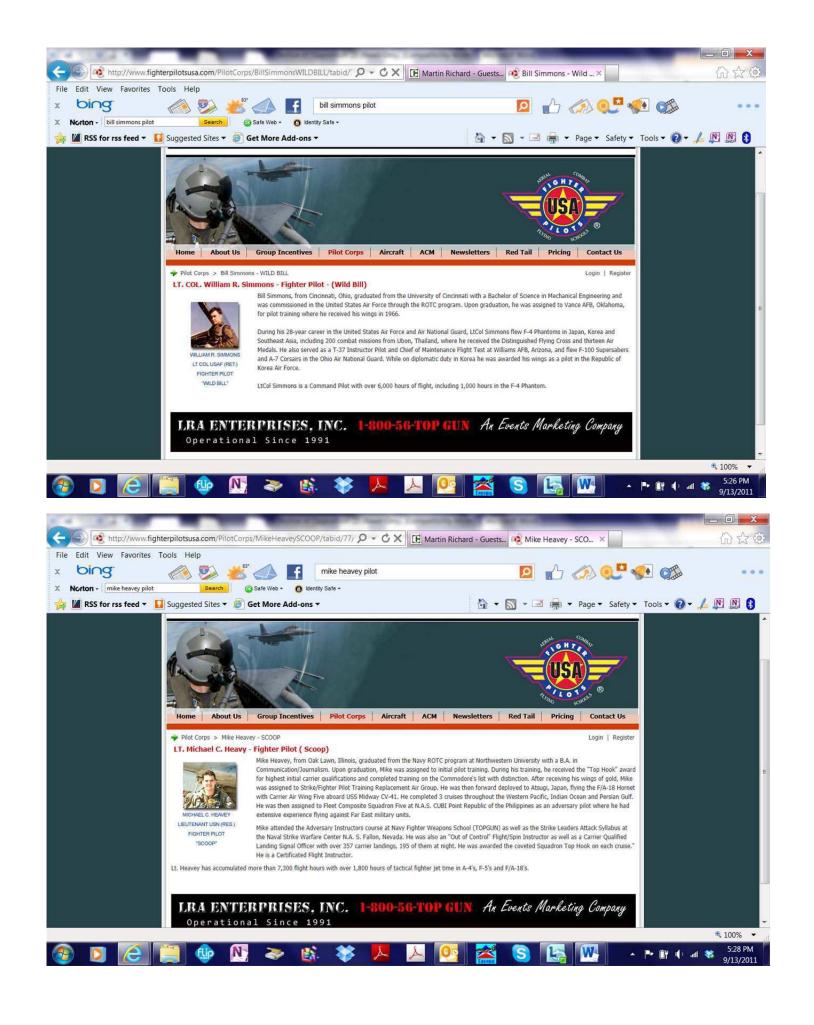


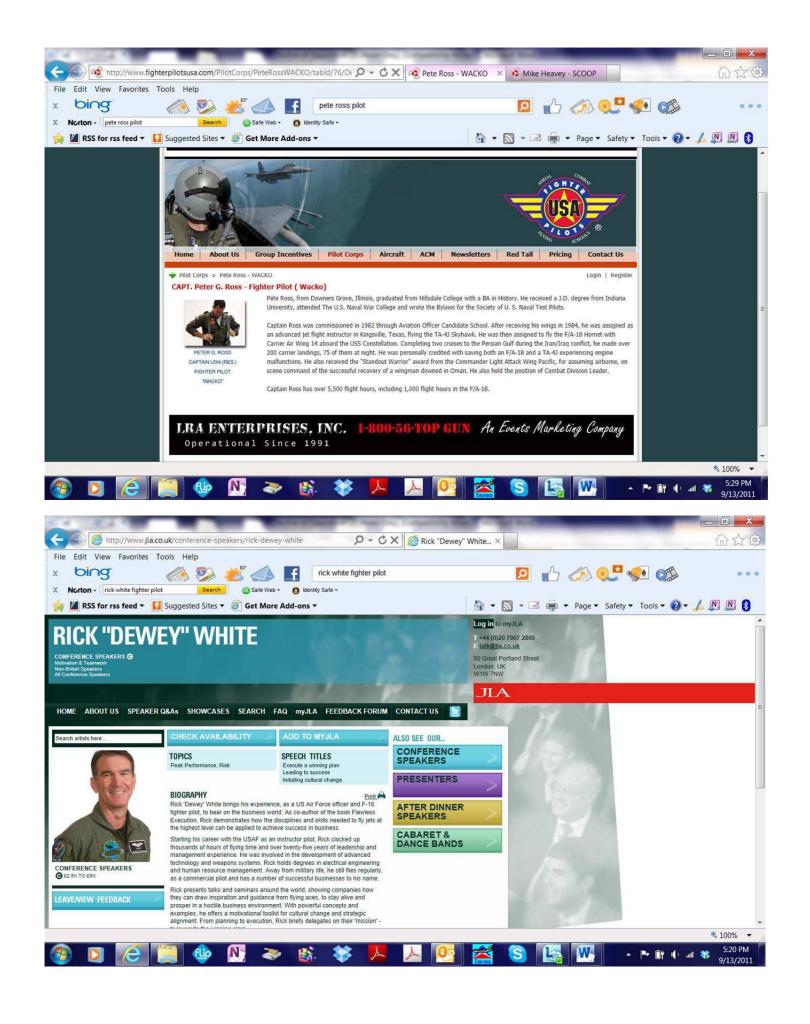


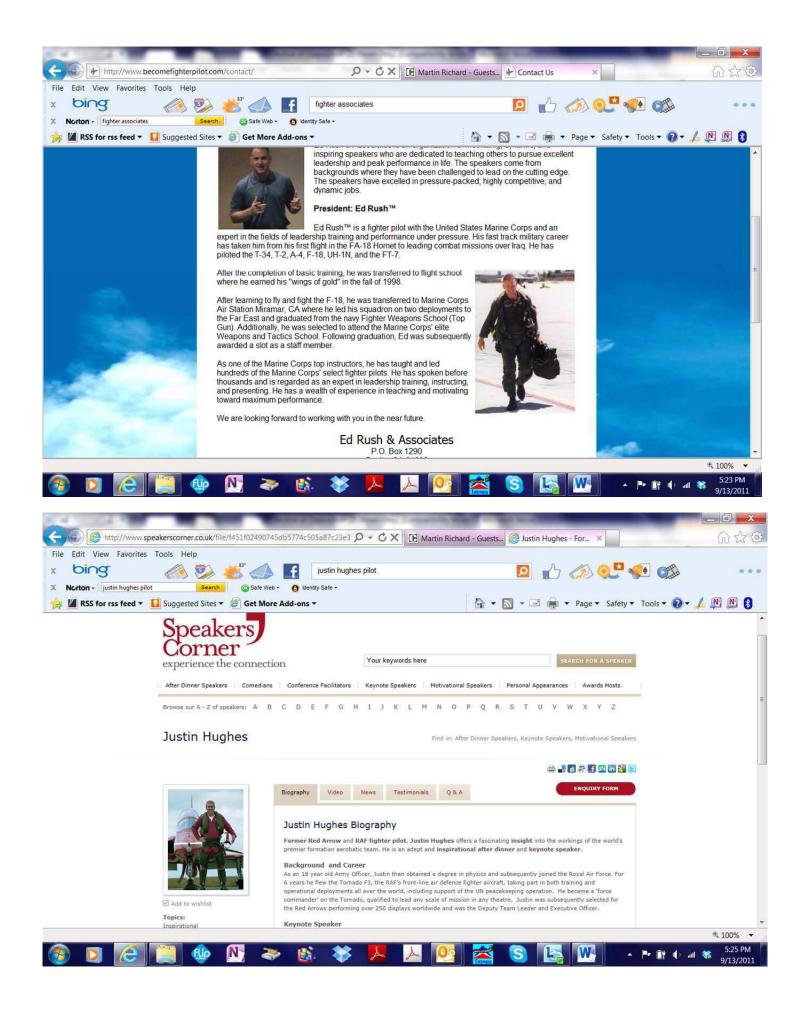












CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Notice of Opposition has been sent via email this 25th day of August, 2017 to:

Michael C. Mason The Law Office of Michael C. Mason 1960 Rosecliff Drive, NE Atlanta, GA 30329 mmtmlaw@gmail.com

/s/ Jordana S. Rubel

Jordana S. Rubel