

ESTTA Tracking number: **ESTTA807393**

Filing date: **03/15/2017**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	H. Best, Ltd.
Granted to Date of previous extension	03/15/2017
Address	1411 BROADWAY,8TH FLOOR New York, NY 10018 UNITED STATES

Attorney information	Meichelle MacGregor/ Vanessa Costantini Cowan, Liebowitz & Latman, P.C. 114 W. 47th Street New York, NY 10036 UNITED STATES mrm@cll.com, rxa@cll.com, esk@cll.com, vpc@cll.com, trademark@cll.com Phone:2127909200
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**Applicant Information**

Application No	86810490	Publication date	11/15/2016
Opposition Filing Date	03/15/2017	Opposition Period Ends	03/15/2017
Applicant	2XU Pty Ltd 243 Burwood Road Hawthorn VIC, 3122 AUSTRALIA		

**Goods/Services Affected by Opposition**

Class 010. First Use: 2007/06/30 First Use In Commerce: 2007/06/30 All goods and services in the class are opposed, namely: Medical support and compression clothing, namely, tights, pants, and leggings
Class 025. First Use: 2007/06/30 First Use In Commerce: 2007/06/30 All goods and services in the class are opposed, namely: Men's and women's clothing, namely, tights, pants, and leggings

**Applicant Information**

Application No	86810472	Publication date	11/15/2016
Opposition Filing Date	03/15/2017	Opposition Period Ends	
Applicant	2XU Pty Ltd 243 Burwood Road Hawthorn VIC, 3122 AUSTRALIA		

## Goods/Services Affected by Opposition

Class 010. First Use: 2007/06/30 First Use In Commerce: 2007/06/30  
All goods and services in the class are opposed, namely: Medical support and compression clothing, namely, calf guards, calf covers, and calf sleeves

Class 025. First Use: 2007/06/30 First Use In Commerce: 2007/06/30  
All goods and services in the class are opposed, namely: Men's and women's clothing, namely, calf guards, calf covers, and calf sleeves

## Applicant Information

Application No	86810459	Publication date	11/15/2016
Opposition Filing Date	03/15/2017	Opposition Period Ends	
Applicant	2XU Pty Ltd 243 Burwood Road Hawthorn VIC, 3122 AUSTRALIA		

## Goods/Services Affected by Opposition

Class 010. First Use: 2007/06/30 First Use In Commerce: 2007/06/30  
All goods and services in the class are opposed, namely: Medical support and compression clothing, namely, shorts

Class 025. First Use: 2007/06/30 First Use In Commerce: 2007/06/30  
All goods and services in the class are opposed, namely: Men's and women's clothing, namely, shorts

## Applicant Information

Application No	86895095	Publication date	11/15/2016
Opposition Filing Date	03/15/2017	Opposition Period Ends	
Applicant	2XU Pty Ltd 243 Burwood Road Hawthorn, VIC, 3122 AUSTRALIA		

## Goods/Services Affected by Opposition

Class 010. First Use: 2007/06/30 First Use In Commerce: 2007/06/30  
All goods and services in the class are opposed, namely: Medical support and compression clothing, namely, body suits, leggings, tops, pants, arm covers and sleeves, calf covers and sleeves, bib suits, socks, stockings, gloves, and underwear

Class 025. First Use: 2007/06/30 First Use In Commerce: 2007/06/30  
All goods and services in the class are opposed, namely: Men's and women's clothing, namely, swimwear, swimsuits, and wet suits; men's and women's clothing, namely, jackets, water proof jackets, short sleeved shirts, tank tops, singlets, long sleeved shirts, t-shirts, polo shirts, jerseys, sweaters, sweatshirts, water proof shirts, shorts, pants, water proof pants, track suits, tights, leg covers and sleeves, armcovers and sleeves, bib suits, body suits, belts, socks, stockings, underwear, and gloves; men's and women's clothing, namely, night wear and lounge wear; headgear, namely, hats, caps, beanies, and visors; footwear, namely, shoes, sandals, and cycle shoe covers

## Grounds for Opposition

The mark is not inherently distinctive and has not	Trademark Act Sections 1, 2 and 45; and Section
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acquired distinctiveness	2(f)
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Attachments	2XU NOO.pdf(44823 bytes )
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Signature	/Vanessa Costantini/
Name	Meichelle MacGregor/ Vanessa Costantini
Date	03/15/2017



swimsuits, and wet suits; men's and women's clothing, namely, jackets, water proof jackets, short sleeved shirts, tank tops, singlets, long sleeved shirts, t-shirts, polo shirts, jerseys, sweaters, sweatshirts, water proof shirts, shorts, pants, water proof pants, track suits, tights, leg covers and sleeves, arm covers and sleeves, bib suits, body suits, belts, socks, stockings, underwear, and gloves; men's and women's clothing, namely, night wear and lounge wear; headgear, namely, hats, caps, beanies, and visors; footwear, namely, shoes, sandals, and cycle shoe covers" in International Class 25 (the "Applications"), and having been granted extensions of time to oppose up to and including March 15, 2017, hereby opposes the same.

As grounds for opposition, it is alleged that:

1. Opposer is a leading manufacturer in the United States of apparel and fashion related accessories, and has used and is using marks comprising or containing the term 2(X)IST and (X) ("Opposer's Marks") in connection with a variety of goods and services, including, but not limited to, apparel and fashion related accessories.


2. On November 5, 2015, Applicant filed Application Serial No. 86/810,490 (the "490 Application") for the mark X and Design for "Medical support and compression clothing, namely, tights, pants, and leggings" in International Class 10 and "Men's and women's clothing, namely, tights, pants, and leggings" in International Class 25. The mark is described in the application as follows: "The mark consists of a three-dimensional configuration comprising an "X" design feature on the right exterior side of a product design for pants; the matter shown in broken or dotted lines is not part of the mark and serves only to show the position or placement of the mark." Applicant claimed a first use date of "at least as early as June 30, 2007" for both classes.

3. On November 5, 2015, Applicant filed Application Serial No. 86/810,472 (the “472 Application”) for the mark X and Design for “Medical support and compression clothing, namely, calf guards, calf covers, and calf sleeves” in International Class 10 and “Men’s and women’s clothing, namely, calf guards, calf covers, and calf sleeves” in International Class 25. The mark is described in the application as follows: “The mark consists of a three-dimensional configuration comprising an “X” design feature on the rear exterior side of a product design for calf coverings; the matter shown in broken or dotted lines is not part of the mark and serves only to show the position or placement of the mark.” Applicant claimed a first use date of “at least as early as June 30, 2007” for both classes.

4. On November 5, 2015, Applicant filed Application Serial No. 86/810,459 (the “459 Application”) for the mark X and Design for “Medical support and compression clothing, namely, shorts” in International Class 10 and “Men’s and women’s clothing, namely, shorts” in International Class 25. The mark is described in the application as follows: “The mark consists of a three-dimensional configuration comprising an “X” design feature on the right exterior side of a product design for shorts; the matter shown in broken or dotted lines is not part of the mark and serves only to show the position or placement of the mark.” Applicant claimed a first use date of “at least as early as June 30, 2007” for both classes.

5. In the ’490 Application, the ’472 Application and the ’459 Application (collectively, “Applicant’s X and Design Applications”), Applicant seeks registration of a three-dimensional configuration comprising an “X” design feature (“Applicant’s X Design”) in a particular position on the goods set forth in the respective applications.

6. On February 2, 2016, Applicant filed Application Serial No. 86/895,095 for the X

Stylized mark shown here:  (“Applicant’s Stylized X Mark”) for “Medical support and compression clothing, namely, body suits, leggings, tops, pants, arm covers and sleeves, calf covers and sleeves, bib suits, socks, stockings, gloves, and underwear” in International Class 10 and “Men’s and women’s clothing, namely, swimwear, swimsuits, and wet suits; men's and women's clothing, namely, jackets, water proof jackets, short sleeved shirts, tank tops, singlets, long sleeved shirts, t-shirts, polo shirts, jerseys, sweaters, sweatshirts, water proof shirts, shorts, pants, water proof pants, track suits, tights, leg covers and sleeves, arm covers and sleeves, bib suits, body suits, belts, socks, stockings, underwear, and gloves; men's and women's clothing, namely, night wear and lounge wear; headgear, namely, hats, caps, beanies, and visors; footwear, namely, shoes, sandals, and cycle shoe covers” in International Class 25. Applicant claimed a first use date of “June 30, 2007” for both classes.

7. In support of each of Applicant’s X and Design Applications, Applicant submitted a declaration stating that Applicant’s X Design had become distinctive of Applicant’s goods. However, while the declarations refer generally to worldwide sales and U.S. sales of Applicant’s compression products they do not refer to the specific sales revenue for compression garments that bear Applicant’s X Design. Further, the declarations fail to reference separately sales volume in units or dollars for pants, calf coverings and/or shorts that bear Applicant’s X Design, and also fail to state whether such garments have depicted Applicant’s X Design in the position sought in Applicant’s X and Design Applications, and, if so, to what extent.

8. The position of Applicant’s X Design as set forth in Applicant’s X and Design Applications is not distinctive and is merely ornamental and has not achieved secondary meaning

either at the time of the filing of Applicant's X and Design Applications or presently. Thus, the marks set forth in Applicant's X and Design Applications do not serve to indicate source and are not entitled to registration.

9. Applicant's Stylized X Mark is likewise non-distinctive and has not achieved secondary meaning, and, thus, is not entitled to registration.

10. Opposer is and will continue to be damaged if registration of the marks in the Applications is granted to Applicant because the granting of such registrations would give Applicant statutory rights to which it is not entitled to the exclusion of Opposer and others.

WHEREFORE, Opposer believes that it will be damaged by registration of the marks in the Applications and requests that the opposition be sustained and said registration be denied.

Please recognize as attorneys for Opposer in this proceeding Meichelle M. MacGregor, Vanessa Costantini (members of the bar of the State of New York) and the firm Cowan, Liebowitz & Latman, P.C., 114 West 47<sup>th</sup> Street, New York, New York 10036.

Please address all communications to Meichelle R. MacGregor, Esq. at the address listed below.

Dated: New York, New York  
March 15, 2017

Respectfully submitted,  
COWAN LIEBOWITZ & LATMAN, P.C.  
Attorneys for Opposer

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