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

Proceeding	91202562
Party	Plaintiff Boston Athletic Association
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Boston Athletic Association, Opposer v. Velocity, LLC, Applicant	)	Opposition No. 91/202562

UNITED STATES PATENT AND TRADEMARK OFFICE
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Pursuant to Rule 2.128(a) of the Trademark Rules of Practice, 37 C.F.R. §2.128(a) Opposer Boston Athletic Association (the "BAA" or "Opposer") respectfully submits the following Trial Brief in support of its opposition against Applicant Velocity, Inc.'s ("Applicant") application to register the mark MARATHON MONDAY covering "clothing, namely, tops, bottoms, headwear, sweatshirts, sweat pants, jackets, pullovers, caps, hats, socks."

I. SUMMARY OF ARGUMENT

This is an opposition proceeding brought by Opposer, Boston Athletic Association, seeking refusal of U.S. Trademark Application Serial No. 85/224698 for the mark MARATHON MONDAY. Opposer brought the Opposition under Sections 2(a) and 2(d) of the Trademark Acts, 15 U.S.C. §1052(a) and (d), but Opposer has now elected to proceed solely with its claim under Section 2(a) of the Trademark Act, and will not pursue a Section 2(d) claim. The Opposer seeks refusal of the mark because Applicant's MARATHON MONDAY mark points uniquely and unmistakably to the Opposer such that the applied-for mark falsely suggests a connection with another person or corporation, specifically, the Opposer, in violation of Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a). Applicant's Mark should be refused registration under Section 2(a) of the Lanham Act because it falsely suggests a connection with the Boston Athletic Association and the Boston Marathon.

II. DESCRIPTION OF RECORD

In accordance with Rule 2.128(b) of the Trademark Rules of Practice and T.B.M.P. § 801.03, Opposer provides the following description of the record:

(1) U.S. Patent and Trademark file for Applicant's application Serial No. 85/22469 to register MARATHON MONDAY;

(2) Opposer's Notices of Reliance, filed by Opposer on July 25, 2013, including:

(a) True and correct printouts of the following printed publications, relevant

to show the public's perception of the phrase "Marathon Monday," marked as Trial Exhibits 1-27.

i. "MBTA Prepared To Carry Thousands To The Boston Marathon," http://www.mbta.com/about_the_mbta/news_events/?id=21419;

ii. "Marathon Monday Drinkfest," https://www.facebook.com/events/160891937304363/;

iii. Boston Biker, "Hal's 26th Annual Marathon Monday Ride, http://bostonbiker.org/2011/04/07/hal%E2%80%99s-26th-annual-marathon-monday-ride/;

iv. "Marathon Monday T-Shirt Design Ideas," http://www.customink.com/photos/tags/marathon-monday;

v. "Mistress Carrie Live for Marathon Monday @ Lir 4.8.11 Gallery," http://www2.waaf.com/photos/gallery/180;

vi. "Marathon Monday," https://www.facebook.com/pages/Marathon-Monday/143894462343343;

vii. "Marathon Monday workouts," http://www.examiner.com/article/marathon-monday-workouts;

viii. "Marathon Monday@ The PUMA Store Newbury Street"; http://www.puma.com/running/events/marathon-monday-the-puma-store-newbury-street;

ix. Boston Magazine, "Marathon Weekend Picks," http://www.bostonmagazine.com/2008/04/marathon-weekend-picks/;

x. Daily Free Press, "Marathon Monday ranked one of best college

traditions," http://dailyfreepress.com/2011/11/15/marathon-monday-ranked-one-of-best-college-traditions/;

xi. "Marathon Weekend: Marathon Monday," http://www.baa.org/races/boston-marathon/marathon-weekend/marathon-monday.aspx;

xii. 2012 Boston Marathon Results Book, Advertisements by John Hancock;

xiii. Advertisement for SportsRadio WEEI, dated 4/16/2012;

xiv. Definition of "Boston Marathon," published by Wikipedia.org http://en.wikipedia.org/wiki/Boston_Marathon;

xv. "Many runners succumb to heat on Marathon Monday," http://www1.whdh.com/news/articles/local/boston/12007230442930/many-runners-succumb-to-heat-on-marathon-monday/;

xvi. Sarah Fit, Enabling Your Passion for Healthy Living, "Marathon Monday," http://sarahfit.com/marathon-monday/;

xvii. The Daily Free Press, "Staff Edit: Marathon Monday," http://dailyfreepress.com/2012/04/17/staff-edit-marathon-monday/;

xviii. RunnersWorld, "2100 Got Medical Treatment Marathon Monday," http://www.runnersworld.com/elite-runners/2100-got-medical-treatment-marathon-monday;

xix. RunnersWorld, "Nan Kennard a Big Fan of Marathon Monday," http://www.runnersworld.com/races/nan-kennard-big-fan-marathon-monday;

xx. RunnersWorld, "Songs about Boston,"

http://www.runnersworld.com/workout-music/songs-about-boston;

xxi. NECN, "Which Boston Patriots Day Boston-Related Sporting Event are you most Excited About?" http://nesn.com/2012/04/vote-which-boston-patriots-day-sporting-event-are-you-most-excited-about/?/;

xxii. Hubway.com, "Mayor Menino Kicks Off Second Season of New Balance Hubway," http://thehubway.com/news/2012/04/03/mayor-menino-kicks-off-second-season-of-new-balance-hubway/;

xxiii. The Boston Globe, "Hotel chefs look forward to feeding marathoners," April 10, 2013;

xxiv. Boston Bar Association News Release, "Boston Bar Recruiting Lawyer Volunteers in Wake of Explosions on Marathon Monday";

xxv. Boston Bar Association News Release, "Boston Bar Foundation Gives $25,000 to the One Fund Boston";

xxvi. The City of Boston.gov, "Mayor Menino Announces "Boston Strong" Effort to Encourage More Business in Back Bay";

xxvii. Women's Running Magazine, "Marathon Monday Motivation," http://womensrunning.competitor.com/2012/01/inspiration/marathon-monday-motivation_639;

(b) A true and correct copy of Applicant Velocity, LLC's Responses to Opposer's First Set of Interrogatories;

(c) A true and correct copy of Applicant Velocity, LLC's Responses to Opposer's First Request for Production of Documents and things;

(d) A true and correct copy of Applicant Velocity, LLC's Responses to Opposer's First Request for Admissions to Applicant;

(e) A true and correct copy of U.S. Trademark Registration No. 1346832 for the mark BOSTON MARATHON and its status;

(f) A true and correct copy of U.S. Trademark Registration No. 1832708 for the mark BOSTON MARATHON and its status;

(g) A true and correct copy of the testimony deposition of John Fleming, and the accompanying Exhibits 1-31;

(h) Applicant's First Notice of Reliance and Exhibits 1-29;

(i) Applicant's Second Notice of Reliance and Exhibit 30;

(j) Applicant's Third Notice of Reliance and Exhibits 31-33.

(k) Applicant's Fourth Notice of Reliance and Exhibits 34 and 35.

III. STATEMENT OF THE ISSUE

Whether Applicant's MARATHON MONDAY mark falsely suggests a connection with the Opposer in violation of Section 2(a) of the Lanham Act.

IV. FACTUAL BACKGROUND

The Opposer, established in 1887, is a non-profit organization with a mission of managing athletic events and promoting a healthy lifestyle through sports, especially running. Since 1897, the Opposer has organized, promoted and managed the running of the Boston

Marathon each year. *See, Trial Exhibit #14, Definition of "Boston Marathon," published by Wikipedia.org http://en.wikipedia.org/wiki/Boston_Marathon. See, Deposition of John Fleming 17:10.* The Boston Marathon, considered one of the world's most prestigious road races, attracts professional and amateur runners from around the world. At the present time, the race is broadcast live locally, nationally and internationally to more than 125 countries annually. *See, Deposition of John Fleming 12:21-22.* Opposer owns United States Trademark Registrations Nos. 1346832 and 1832708 for the mark BOSTON MARATHON, as well as other marks that include the term BOSTON MARATHON.

On race day, hundreds of thousands of runners, spectators and vendors selling goods, services and food, descend along the 26.2 mile race route from Hopkington, Massachusetts to downtown Boston, Massachusetts and gather at the race end in downtown Boston. *See, Opposer's Fourth Notice of Reliance, Fleming Deposition, Exhibit 10.* As well as organizing and managing the running of the Boston Marathon, Opposer, through its licensees, provide a number of goods affiliated with the running of the marathon under its BOSTON MARATHON marks, goods such as souvenir program books, maps, lithographic prints and posters, rings, pendants, pens, pins, and clothing, such as shirts, sweatshirts, T-shirts, jackets, gloves, shorts, hats, and pants. *See, Opposer's Third Notice of Reliance, Fourth Notice of Reliance Fleming deposition at 14:12-24.* The typical purchaser of Opposer's goods bearing the BOSTON MARATHON marks are running enthusiasts, current and past participants in the Boston Marathon and their family and friends, spectators and fans of the Boston Marathon. *See, Deposition of John Fleming, 15:12-24.* Other vendors who do not have a license from Opposer to utilize the BOSTON MARATHON marks provide similar goods that do not bear the BOSTON MARATHON marks or any other mark or term previously used by Opposer,

particularly clothing items and hats, along the route and at the end of the marathon, but these other vendors may not use the BOSTON MARATHON marks. *See, Opposer's Fourth Notice of Reliance, Fleming Deposition Exhibits 11, 12.*

The Boston Marathon has been held on the third Monday in April since 1969. *See, Trial Exhibit #14, Definition of "Boston Marathon," published by Wikipedia.org http://en.wikipedia.org/wiki/Boston_Marathon.* The Boston Marathon is the only major marathon run on a Monday. *See, Notice of Opposition, Allegation 6 and Opposer's Responses to Applicant's First Set of Interrogatories, No. 6 and 7.* Because the Boston Marathon is the only major marathon held on a Monday, the mark "MARATHON MONDAY" has been used by Opposer and by others to refer to the Opposer and its Marathon, and the provision of goods and services by Opposer and/or its licensees, since at least the mid 1970's. *See, Notice of Opposition, Allegation 7, Opposer's Trial Exhibit 11 and 12 and Fleming Deposition Exhibits 2 and 14.* The mark MARATHON MONDAY is used by government (*See, Opposer's Trial Exhibits 1, 22, 24,and 26 and Fleming Deposition Exhibit 4*), the media (*See, Opposer's Trial Exhibits 5, 7, 9, 10, 13, 15, 17, 18, 19, 20, and 21 and Fleming Deposition Exhibits 9, 16, 19, 10, 22, 23, 24*) and by runners and the public, all to refer to the Opposer and its Marathon (*See, Opposer's Trial Exhibits 2, 3, 6, 16, 25, and 27 and Fleming Deposition Exhibits 7 and 13*). Merchants use the phrase to promote their goods and services for the day of the Opposer operates its Boston Marathon (*See, Opposer's Trial Exhibits #4, 8, and 23 and Fleming Deposition Exhibits 3, 5, 8 , 10, 11, 12, 15, 17, 18, 21, 25*).

The phrase "Marathon Monday" is not a name or identity associated with the Opposer solely in Boston or even Massachusetts. Because of the history of the running of the Boston Marathon, and because it attracts runners, media and spectators from around the country and

around the world, the phrase "Marathon Monday" is used by Opposer and by others in connection with the Boston Marathon, the Boston Marathon festivities and the promotion of various goods and services. For example, students at Arizona State University celebrate the Boston Marathon with their own "Marathon Monday" celebrations. *See, Opposer's Trial Exhibit No. 2.* CustomInk, a Washington DC business, and Café Press, an online merchant, promote T-shirts for the Boston Marathon with the phrase "Marathon Monday" on the shirts. *See, Opposer's Trial Exhibit No. 4 and Fleming Deposition, No. 5.* Similarly, media all over the country use "Marathon Monday" to identify the Opposer and the Boston Marathon festivities. (*See, Opposer's Trial Exhibits No. 7 and Fleming Deposition No. 13[writers in Scottsdale Arizona], Nos. 18, 19 and 20 [a national magazine headquartered in Pennsylvania], No. 27 [a national magazine headquartered in San Diego, California], Fleming Deposition Exhibit 16 [Smithsonian Student Traveler], Fleming Exhibit 19 [the Daytona Beach Morning Journal], Fleming Deposition Exhibit 20 [the Star Bulletin, Hawaii]).* The phrase "Marathon Monday" is known nationwide (and internationally) to sports and running enthusiasts and to the public to identify the Opposer, its goods and services, and to identify the Boston Marathon and its associated activities.

As a result of the extensive use of the mark "MARATHON MONDAY" since the 1970's by Opposer and by others to refer to the Boston Marathon operated by Opposer and the provision of goods and services by Opposer and/or its licensees, the mark "MARATHON MONDAY" cannot identify the applicant as source as it suggests a connection with the Opposer, the Boston Marathon and its associated festivities, and has become synonymous with the Boston Marathon and with Opposer, and identifies Opposer and its goods and services.

On January 24, 2011, applicant filed an intent to use application under Section 1(b) of the

Lanham Act to register the mark MARATHON MONDAY (Serial No. 85224698) for use in connection with "clothing, namely, tops, bottoms, headwear, sweatshirts, sweat pants, jackets, pullovers, caps, hats, socks." On April 11, 2011, the applicant filed its Amendment to Allege Use, claiming a first date of use of the mark in commerce on April 11, 2011.

Prior to the filing of its MARATHON MONDAY application, the applicant was aware of the Opposer and its Boston Marathon. Applicant is located in Everett, Massachusetts, and at one time, conducted business with Opposer. Opposer had utilized Applicant to screen and embroider certain apparel items that were used as promotional items, provided to the participants, volunteers, organizing committee members and/or to staff of Opposer. Applicant's representative had approached Opposer seeking a license to produce clothing items with Opposer's BOSTON MARATHON and other marks. Opposer explained that another party had an exclusive license to use the BOSTON MARATHON marks in connection with apparel items, and therefore, Opposer could not consider providing a license to Applicant. *See, Fleming Deposition, 20:2 – 24:8.*

In response to the Opposer's Discovery Requests, the Applicant has provided evidence of use of the mark MARATHON MONDAY on only t-shirts and caps, but the description of goods in this application continues to state "clothing, namely, tops, bottoms, headwear, sweatshirts, sweat pants, jackets, pullovers, caps, hats, socks." In making its Amendment to Allege Use, Applicant had not deleted the goods not yet used with its mark. *See, Applicant's Trial Exhibit #28, Applicant's Response to Interrogatory No. 7.* Upon information and belief, Applicant has not provided the remaining goods listed in its application, namely, "bottoms, sweatshirts, sweat pants, jackets, pullovers, and socks," but has not deleted those goods from its now use-based application. *See, Applicant's Trial Exhibit # 28, Applicant's Response to Opposer's First Set of*

Interrogatories Nos. 5 and 7.

Applicant's marketing of the goods bearing its MARATHON MONDAY mark confirms the Applicant's intent to trade on the goodwill of the Opposer. The Boston Marathon is run on the third Monday of April each year. According to the evidence provided by Applicant under its continuing obligation to respond to Opposer's Discovery Requests, Applicant's sales of its t-shirts and caps were made only in April 2011 and only to parties located in Londonderry, NH, Hanover, MA, and Boston, MA, locations in close proximity to the Boston Marathon event. *See, Applicant's Trial Exhibit # 29, Velocity Invoices to Mike Wilson, Boston Tops, Supah Fans, and Hudson News.*

V. APPLICANT'S MARK SHOULD BE REFUSED REGISTRATION

Applicant's Mark falsely suggests a connection with the Opposer in Violation of Section 2(a) of the Lanham Act.

Under Section 2(a) of the Lanham Act, a mark shall be refused registration if it "[c]onsists of or comprises ... matter which ... falsely suggests a connection with persons, living or dead, [or] institutions. 15 U.S.C. § 1052(a). Applicant's Mark should be refused registration under Section 2(a) because it falsely suggests a connection with the Boston Marathon and the Opposer, the Boston Athletic Association.

In order to show false suggestion of a connection, the Opposer must show:

(1) that applicant's mark is the same or a close approximation of opposer's previously used name or identity;

(2) that applicant's mark would be recognized as such by purchasers, in that the mark points uniquely and unmistakably to opposer;

(3) that opposer is not connected with the goods that are sold or will be sold by applicant under his mark; and

(4) that opposer's name or identity is of sufficient fame or reputation that when applicant's mark is used on his goods, a connection with opposer is presumed.

See, *L. & J.G. Stickley Inc. v. Cosser*, 81 USPQ2d 1956 (TTAB 2007) and *Buffet v. Chi-Chi's, Inc.*, 226 U.S.P.Q. 428, 429 (T.T.A.B. 1985). All four elements confirm that Applicant's Mark falsely suggests a connection with the Boston Marathon and the Boston Athletic Association.

While the Opposer has not registered or attempted to register the mark MARATHON MONDAY, the use of the mark by Applicant suggests a connection with the Opposer and with the Boston Marathon. A party acquires a protectable interest in a name under Section 2(a) where the name claimed to be appropriated points uniquely and unmistakably to that party's personality or persona. A party's interest in such a name does not depend for its existence on the adoption and use of a technical trademark. Similarly, though there may be no likelihood of confusion as to the source of the goods, even under a theory of sponsorship or endorsement, nevertheless an opposer's right to control the use of its identity may be violated. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co. Inc.*, 703 F.2d 1372, 217 USPQ 505 (Fed.Cir.1983), aff'g 213 USPQ 594 (TTAB 1982).

In this case, Applicant's mark, MARATHON MONDAY, is identical to a name or identity that the Opposer has previously used. Since the 1970's, the phrase MARATHON MONDAY has been used by Opposer and by others to refer to the Boston Marathon and its associated festivities, all controlled by Opposer. The term MARATHON MONDAY is used by government officials (*See, Opposer's Trial Exhibits 1, 22, 24,and 26 and Fleming Deposition Exhibit 4*), the media (*See, Opposer's Trial Exhibits 5, 7, 9, 10, 13, 15, 17, 18, 19, 20, and 21 and Fleming Deposition Exhibits 9, 16, 19, 10, 22, 23, and 24*) and by runners and the public

(*See, Opposer's Trial Exhibits 2, 3, 6, 16, 25, and 27 and Fleming Deposition Exhibits 7 and 13.*) Merchants use the phrase to promote their goods and services for the day of the Boston Marathon (*See, Opposer's Trial Exhibits #4, 8, and 23 and Fleming Deposition Exhibits 3, 5, 8 , 10, 11, 12, 15, 17, 18, 21, and 25*). Opposer has a protectable interest in this mark for the goods identified in Applicant's application.

The evidence supports the fact that Applicant's mark would be recognized by purchasers to point uniquely and unmistakably to the Opposer. Both the Opposer and the Applicant provide the same goods, hats and caps, and clothing items in general. Both parties are providing their goods to the same ultimate purchasers. The typical purchaser of Opposer's goods bearing the BOSTON MARATHON marks are running enthusiasts, current and past participants in the Boston Marathon and their family and friends, and spectators and fans of the Boston Marathon. *See, Deposition of John Fleming, 15:12-24.* The applicant sells its t-shirts and caps to "wholesale and retailers in the premium … sports categories." *See, Opposer's Second Notice of Reliance, Applicant's Response to Opposer's Interrogatory No. 8.* The evidence shows that Applicant is targeting the Boston Marathon festivities to promote its goods. The Boston Marathon is held on the third Monday in April each year, and, according to the evidence provided by the Applicant, the Applicant's sales of its t-shirts and caps were made only in April 2011 and only to parties located in Londonderry, NH, Hanover, MA, and Boston, MA. *See, Applicant's Trial Exhibit # 29, Velocity Invoices to Mike Wilson, Boston Tops, Supah Fans, and Hudson News.* Applicant has not updated its evidence beyond its initial responses to Opposer's Discovery Requests, despite its continuing obligation to do so, so it is assumed that the 2011 sales to the indicated parties were the only sales made for goods bearing this mark. Given the goods upon which Applicant's Mark is used, the Applicant's channels of trade and the timing of

"clothing, namely, tops, bottoms, headwear, sweatshirts, sweat pants, jackets, pullovers, caps, hats, socks" under its BOSTON MARATHON marks. When Applicant sought to provide goods under the Opposer's Marks, Opposer was not able to license the Applicant because of its prior licensing arrangements. Opposer has not authorized the Applicant to provide the goods sold under the MARATHON MONDAY mark and the Opposer has no connection with Applicant's goods. *See, Fleming Deposition, 20:2 – 24:8.*

The Opposer's name or identity, MARATHON MONDAY, is of sufficient fame or reputation that when applicant's mark is used on its goods, a connection with Opposer would be presumed. As described in the Statement of Facts, since its inception in 1897, the Boston Marathon is considered one of the world's most prestigious road races, attracts professional and amateur runners from around the world and is now broadcast live locally, nationally and internationally to more than 125 countries annually. For over 40 years, MARATHON MONDAY has been used to refer to the Opposer, the Boston Marathon and the day on which the Boston Marathon was run. The mark MARATHON MONDAY is used to refer to the Opposer and its Marathon by government officials, the media and by runners and the public. Merchants use the phrase to refer to the Opposer and its Marathon to promote their goods and services for the day of the Boston Marathon.

The Opposer's name or identity is of sufficient fame that when Applicant uses the mark MARATHON MONDAY on its goods, a connection with Opposer will be presumed, not just in Boston or in Massachusetts, but nationwide and worldwide. Because of the history of the running of the Boston Marathon, and the longstanding use of the identity "Marathon Monday," and because the Boston Marathon attracts runners, media and spectators from around the country and around the world, the phrase "Marathon Monday" will give rise to a connection with

Opposer locally, nationally and worldwide, particularly for the goods provided by the Applicant. The evidence provided shows that persons and businesses from around the country use "Marathon Monday" in connection with the Opposer, the Boston Marathon and its associated festivities, again, as noted in the Statement of Facts. The phrase "Marathon Monday" is known nationwide to sports and running enthusiasts and to the public to identify the Opposer, its goods and services, and with the Boston Marathon and its associated activities.

The evidence provided overwhelmingly shows that the term MARATHON MONDAY has become synonymous with the Opposer and the Boston Marathon.

For all of these reasons, Applicant's Mark should be refused registration, as it falsely suggests a connection with the Opposer.

VI. CONCLUSION

Based upon the reasons and case law set forth herein, Opposer's Notice of Opposition should be granted because refusal is warranted under Section 2(a) due to Applicant's creation of a false suggestion of a connection with Opposer.

Respectfully submitted,

Date: January 7, 2014

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Trial Brief for Opposer was served by first class mail this 7th day of January 2014, upon:

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