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

Proceeding	91213057
Party	Plaintiff Hybrid Athletics, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

HYBRID ATHLETICS, LLC,	:	
	:	
Opposer,	:	Opposition No. 91213057
	:	
v.	:	
	:	
HYLETE LLC,	:	
	:	
Applicant.	:	

**HYBRID ATHLETICS, LLC’S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Opposer Hybrid Athletics, LLC (“Hybrid”) submits this reply brief in support of its pending motion for summary judgment declaring Applicant’s (“Hylete”)  mark unregistrable under Trademark Act § 2(d), 15 U.S.C. § 1502(d), in view of Hybrid Athletics’ prior use of the  trademark as applied to goods identical to those recited in the opposed Application No. 85/837,045 filed January 30, 2013.

Applicant does not dispute that 1) Hybrid owns the  trademark; 2) the  trademark is protectable, 3) that Hybrid has prior rights in the  trademark, or 4) that Opposer’s and Applicant’s goods are identical or closely related. Applicant opposes summary judgment by asserting that the record establishes “genuine” issues of material “fact” concerning likelihood of confusion. However, Applicant’s arguments are based on inapplicable Ninth Circuit case law and are unsupported by any affidavits or other evidence compliant with Rule 56(e) of the Federal Rules of Civil Procedure. Opposer respectfully submits that the Trademark Trial and Appeal

Board should readily grant Hybrid's Motion for Summary Judgment ("Opposer's Motion") and thus, deny registration of Applicant's  mark.

I. NO GENUINE ISSUE OF MATERIAL FACT EXISTS CONCERNING LIKELIHOOD OF CONFUSION

In order to make out a "genuine" issue of fact precluding summary judgment, it was incumbent upon Applicant to submit affidavits "made on personal knowledge" that "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. CIV. P. 56(e). Applicant has not done so.

The only affidavit submitted by Applicant is a brief statement by its counsel, attaching Applicant's opposed trademark application, Hybrid's Interrogatory Responses, which Applicant does not cite in its brief, Facebook pages retrieved on April 1, 2015 and third-party U.S. trademark registrations. (Declaration of Kyriacos Tsircou, signed on April 3, 2015.) This "evidence" is patently insufficient to raise any "genuine" issue of "material" fact in this case. Applicant has failed (a) to identify "specific facts showing there is a genuine issue for trial," FED. R. CIV. P. 56(e), and (b) to support any such "specific facts" with sworn testimony or other evidence that would be admissible at trial and from which the Board could reasonably return a verdict for Applicant with respect to particular facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

In addition, Applicant incorrectly cites Ninth Circuit case law stating the question of likelihood of confusion is a factual one. The Federal Circuit, however, has dismissed this identical argument, noting that the issue of likelihood of confusion is one of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1565 (Fed. Cir. 1987) ("As an initial

matter, we must lay to rest Fashions' argument that because the parties dispute likelihood of confusion, the board could not resolve that "issue of fact" on summary judgment, citing case law from another circuit. The uniform precedent of this court is that the issue of likelihood of confusion is one of law.")

Thus, based on the record now before the Board, there clearly is no competent evidence raising a "genuine issue for trial," FED. R. CIV. P. 56(e), and summary judgment in favor of Opposer is appropriate.

**A. No Genuine Issue of Material Fact
Exists with Regard to the Strength of Hybrid's Mark**

Applicant asserts that Opposers' mark is weak on the basis that "there are numerous third-party registrations in International Class 025 that utilize a stylized H." (Applicant Opp. at 5.) In this regard, Applicant identifies several logos, which Applicant states somehow "demonstrate that Opposer cannot claim exclusive rights to a stylized H in connection with clothing and other sports related goods and services." (Id. at 6.) Even if the "relevant field is saturated with stylized H logos and companies using derivatives of 'Hybrid Athletics,'" as Applicant claims, (Id. at 5), such evidence does nothing to weaken Opposer's  trademark.

First, "the existence of these marks on the register is not evidence of what happens in the marketplace or that customers are familiar with them." *Nike Inc. v. WNBA Enterprises*, 85 U.S.P.Q.2d 1187, 2007 WL 764166 *13 (TTAB 2007). Second, a cursory review of the additional logos cited by Applicant, and as Applicant agrees, demonstrates that none of these marks are confusingly similar to and each differ markedly from the appearance and/or commercial impression of Opposer's  trademark. Moreover, Opposer is not aware of a single incident of actual confusion between any of the cited marks and Opposer's mark. The fact that

distinctive, stylized, non-confusing “H” designs coexist, has no bearing on the determination that Applicant’s “H” design is confusingly similar to Opposer’s  trademark. Consequently, there is no factual or legal dispute that Opposer’s  trademark is valid, distinctive and entitled to strong protection. Finally, the mark “Hybrid Athletics” is not the mark at issue here and therefore, bears no significance in the Board’s determination of Opposer’s Motion.

Thus, there is no genuine issue of material fact as to the strength of Opposer’s trademark.

B. No Genuine Issue of Material Fact Exists that Applicant’s Mark is Likely to be Confused with Opposer’s Mark

Applicant unconvincingly attempts to argue that its  mark is so highly stylized that the letter “H” is virtually unrecognizable. Applicant states that Applicant’s  mark “has no sound and bears minimal resemblance to the letter ‘H.’” (Applicant Opp. at 9.) However, it is extraordinarily hard to believe that a consumer would look at the  mark and not associate it with the “H” in Applicant’s business name “Hylete.” First, the application at issue for the  mark, Serial No. 85/837,045, blatantly admits in the description of the mark that the “mark consists of a stylized ‘H.’”¹ Applicant cannot now argue that  is not an “H.” Second, Applicant’s real world use of the  mark also creates a consumer impression that the mark is an “H.” In simply observing Applicant’s homepage found on www.hylete.com, it is clear that the  mark represents the “H” of “Hylete” since Applicant promotes the  mark numerous times directly adjacent to the term “Hylete.”

¹ Attached as Exhibit A to Applicant’s Opposition.

In support of its argument, Applicant attempts to compare the present case with those of *Nike Inc. and Diamond Alkali Co. v. Dundee Cement Co.*, 343 F.2d 781, 783 (CCPA 1965) (differing letter style of two letter “D”s” held sufficient to avoid confusion). However, both cases actually support Opposer’s arguments that the  trademark and  mark are confusingly similar.

In *Diamond*, one of the claimed “D” logos was so highly stylized, it looked nothing like the letter “D” or “d” -  . Applicant’s  mark, on the other hand, is a stylized “H” – visually and by its own self-admission to being an “H” in its trademark application.

Applicant’s  mark, through its own self admittance, is not an arbitrary design, but an intended “H” and therefore, the letter itself is an essential feature of the mark. In *Nike*, the question of similarity and dissimilarity then becomes more than only a visual comparison, but the fact that the marks are capable of being spoken, and to the extent the marks sound the same when spoken, they would have the same letter mark meaning as well. *Nike*, 2007 WL at *12.

Applicant’s and Opposer’s marks are both a stylized letter “H,” they are presented in the same size and fashion, the exterior shape of each stylized letter is almost exactly the same, etc. (Opposer’s Motion, pp. 12-13.) These marks are not to be dissected into component parts and the minute details of each part compared to the other parts. The Board must keep in mind that the marks may not be seen at the same time and ordinary purchasers, who are familiar with Opposer’s  trademark on clothing and physical fitness services, upon later encountering Applicant’s  mark on “identical and/or closely related [merchandise], would not necessarily remember the fine details about the mark they had previously seen, given their hazy and imperfect recall, and they may remember the marks as being the same.” *Nike*, 2007 WL at *13.

Moreover, Opposer's Motion, presented sworn evidence that this exact occurrence is happening in the marketplace.

Thus, there is no genuine issue of material fact as to the similarity of the marks at issue or that the marks are likely to be confused.

C. No Genuine Issue of Material Fact Exists that Applicant's Mark Has Been Confused with Opposer's Mark

Applicant asserts that no legitimate evidence of confusion exists and criticizes the legitimacy of the consumer comments presented by the Opposer. (Applicant Opp. at 13-14.) Applicant attempts to discredit the consumer concerns and statements of confusion. Aren't they the ones who the law protects? If there is evidence of consumer confusion through emails, text messages, and postings on social networks and/or directly to Opposer, these statements should not be tossed aside or discredited. At the very least they strengthen the argument that there is an overwhelming likelihood that consumers will be confused.

Applicant has not only failed to disprove the absence of actual confusion, but has also failed to address the fact that its own employees have experienced actual confusion. As outlined in Opposer's Motion and the Declaration of Robert Orlando, Opposer worked previously with Matt Paulson, who now works for Applicant, to brand the  trademark on Jaco clothing. (Orlando Decl. ¶ 40.) In 2012, Mr. Paulson contacted Opposer about the opportunity to market the  mark and Opposer immediately declined the offer, informing Mr. Paulson that he was concerned by how strikingly similar the marks were. (Id. ¶¶42-46.) Tellingly, in an email to Mr. Orlando, Mr. Paulson even admitted as much stating: "I won't lie, in the beginning we had a few people say it looks like your logo." (Id. ¶¶47-48; Exh. 25.) Applicant has failed to submit any affidavits from even Mr. Paulson, its own employee, to rebut such an admission. Moreover,

Applicant has been on notice of at least some of the actual confusion evidence presented by Opposer (if not also from its own customers) for over a year and ignored such statements.

Thus, there is no genuine issue of material fact as to the similarity of the marks at issue or that the marks are likely to be confused.

D. No Genuine Issue of Material Fact Exists that Opposer's and Applicant's Goods Travel in the Same Channels of Trade

Absent any restriction in the respective applications and registrations, the Board must presume that Applicant's goods and Opposer's goods are sold through all normal channels of trade for those goods.

Applicant admits that the goods of Opposer and Applicant are "similar." Yet it then twists Opposer's argument that the channels of trade are narrowed to CrossFit Athletes. Opposer, in its Motion, specifically states that Opposer's and Applicant's apparel are "available for purchase from the wide consumer base of people who exercise in general." (Opposer's Motion, p. 16.) However, Opposer does not restrict the channels of trade in any way. More importantly, Opposer added that both Applicant's and Opposer's merchandise are sought after by those who participate in CrossFit training. This is important to note because in the world of CrossFit, consumers will most likely encounter both Opposer's and Applicant's goods on a frequent basis, making the probability of a likelihood of confusion even higher.

Regardless, Applicant has not presented any argument that disputes any material fact about the channels of trade in which Applicant's and Opposer's goods travel. Therefore, no genuine issue of material fact exists for this issue.

II. CONCLUSION

Applicant has failed to present any genuine issues of material fact that would make this matter incapable of being determined on summary judgment. It was Applicant's burden to demonstrate that a genuine disputed fact exists and it has not done so. Applicant has not presented any evidence on record, through affidavit or otherwise, that would dispute the following material facts:

- 1) Opposer owns the  trademark;
- 2) The  trademark is protectable;
- 3) Opposer has prior rights in the  trademark;
- 4) Opposer's and Applicant's marks are both a stylized letter "H."
- 5) Opposer and Applicant have both witnessed actual confusion between the  trademark and the  mark and have received comments regarding the similarity of the marks from consumers.
- 6) Opposer's and Applicant's goods are identical or closely related.
- 7) Opposer's and Applicant's goods travel in the same trade channels.

Applicant worked closely with Opposer. Applicant named its clothing brand "Hylete" after years of working with "Hybrid" - it cannot be a coincidence that Hylete decided to pick a stylized "H" so similar to that of Opposer's "H." There was a close relationship between the two parties and Applicant was very familiar with Opposer's brand. There is no amount of additional discovery or testimony that will change the outcome of this analysis. There is no doubt that

Applicant's and Opposer's marks are confusingly similar and consumers, since day one of Applicant's use of the  mark, have expressed the same.

Opposer hereby respectfully requests that the Board grant its Motion for Summary Judgment in its favor.

Respectfully submitted,

HYBRID ATHLETICS, LLC

April 16, 2015

/s/ Wesley W. Whitmyer, Jr.

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was served by first class mail, postage prepaid on the Correspondent for the Applicant as follows:

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