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

Proceeding	91213057
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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<b>HYBRID ATHLETICS, LLC,</b>	:	
	:	
<b>Opposer,</b>	:	<b>Opposition No. 91213057</b>
	:	
<b>v.</b>	:	<b>Trademark: Hylete “H” Logo</b>
	:	
<b>HYLETE LLC,</b>	:	
	:	
<b>Applicant.</b>	:	

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**TRIAL BRIEF OF OPPOSER HYBRID ATHLETICS, LLC**

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**REDACTED**

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Opposer, Hybrid Athletics, LLC (“Opposer” or “Hybrid”), by and through its counsel Whitmyer IP Group, hereby submits its Trial Brief pursuant to 37 C.F.R. § 2.128(a)(1), TBMP § 801, and in support of its opposition against the application by Applicant Hylete LLC (“Applicant” or “Hylete”) for registration of the Hylete “H” logo,  (the “ logo”).

## **I. INTRODUCTION**

Hybrid Athletics and its “H” trademark, the “ trademark,” are extraordinarily well-known and famous throughout the health and fitness industry, but especially in the world of CrossFit. The strength of the  trademark will be shown time and again throughout this brief, as will the likelihood of confusion caused by Applicant’s use and registration of its  logo. This is a story not only of Opposer, but Opposer’s creator, owner and operator, Robert Orlando. Mr. Orlando and his fame and reputation, are synonymous with the fame of the brand and the  trademark. This is also a story of a community, a community of millions of CrossFitters around the world, a community with a billion dollar economy, and Mr. Orlando’s role in shaping the community and launching it into the mainstream of health and fitness. Testimony from key figures in the CrossFit community will be heard and cited throughout this brief, figures famous in the world of health and fitness and who know CrossFit and the world of health and fitness better than anyone. Not only will Mr. Orlando testify to the strength and use of the  trademark, as well as his experiences of actual confusion in the marketplace, but the following witnesses will also testify that Opposer’s  trademark has become iconic in the CrossFit community and how they have personally experienced confusion between Opposer’s and Applicant’s logos:

- ❖ David Castro – The Director of Training for CrossFit and the Director (and the face) of the CrossFit Games. He has officially worked for CrossFit since 2006 and has attended every CrossFit Games and regional event, including the first CrossFit Games ever, held in 2007, on his parents’ ranch. Mr. Castro has visited thousands of CrossFit gyms and he is a well-known, prominent figure in the CrossFit community.
- ❖ Dale Saran – General Counsel for CrossFit, Inc., oversees the licensing of the CrossFit mark and is very familiar with the affiliate gyms and brands in the CrossFit community. Mr. Saran has been working as a CrossFit employee since 2009, has attended at least two regional CrossFit Games events a year, and has visited hundreds of CrossFit gyms.
- ❖ Matt Tuthill – Deputy Editor of Muscle & Fitness Magazine, a magazine that reaches 8,000,000 people monthly and one of the most preeminent magazines in the fitness industry for over seven decades. Mr. Tuthill oversees the day-to-day decision making of the magazine content. His roles at Muscle & Fitness have also included interviewing athletes, celebrities and writing featured articles. Mr. Tuthill travels to various gyms and sports events for interviews, photoshoots and stories to put into the magazine.
- ❖ Jason Leydon – Owner and Head Coach of CrossFit Milford since November 2008. Mr. Leydon has been a Subject Matter Expert (SME trainer) for CrossFit Inc., conducting CrossFit Endurance seminars and a Level 1 trainer for CrossFit certification courses. Mr. Leydon also travels all over the U.S. coaching his own fitness seminars. He was a competitive CrossFit athlete from 2009 through 2012 and now trains individual athletes and teams who compete at the CrossFit Games. His teams have ranked highly in such competitions. Mr. Leydon has also been to many regional CrossFit events.

- ❖ Syncere Martinez – Owner of CrossFit Harlem (CrossFit affiliate since 2009), an apparel company, and a coffee company, focusing on the CrossFit community. Mr. Martinez has attended numerous CrossFit events, as an athlete, trainer and retailer to sell his apparel and coffee products. In 2015, Mr. Martinez was chosen to create celebrity gift baskets of his branded merchandise at the ESPY's (ESPN's sports award show) (Martinez Dep. 23:7-22) He is highly familiar with the CrossFit community and the brands represented therein.
- ❖ Ian Jentgen – Head trainer and general manager of sales, assistant coach and day-to-day functioning of Hybrid Athletics. Mr. Jentgen became a member of Opposer's gym in 2012 and started working for Opposer in 2013. Mr. Jentgen has assisted Mr. Orlando with numerous aspects of his business, running the merchandise booths at CrossFit events, and travelling with Mr. Orlando to assist at his training seminars. He has visited hundreds of CrossFit gyms both in his capacity as a coach and while on personal travel.

Each of the above referenced witnesses have traveled around the world and are highly familiar with athletic brands and the fitness world. Each also have highly intimate knowledge of the CrossFit community and the athletes and brands that make up this highly popular worldwide sports movement.

Robert Orlando, creator and owner of Opposer, set out to break boundaries in the area of fitness. Early in his career, Mr. Orlando made a huge impression on the CrossFit community. Mr. Orlando was flipping 1000 pound tires, pressing yolks above his head and lifting atlas stones weighing hundreds of pounds in record time, and posting videos of these tenacious workouts online. Between 2008-2011, Mr. Orlando's videos went viral through the CrossFit community and beyond. Through Mr. Orlando's tireless efforts, investment, and repeated success as a competitive CrossFit and Strongman athlete, he became a CrossFit superstar in 2009, which

propelled him, his Hybrid Athletics brand and  trademark into iconic symbols throughout the CrossFit community. Since then, the Hybrid Athletics brand and  trademark has continued to grow each year and into the very strong fitness brand it is today. Mr. Orlando has traveled the world teaching CrossFit and Strongman workout techniques to dedicated athletes and individuals, as well as appearing in national fitness magazines not only as the subject of the articles, but also as a writer. People come from all over the world to workout in Mr. Orlando's gym and to take pictures in front of the symbolic  trademark on Mr. Orlando's gym wall and pegboard. Through all of Mr. Orlando's efforts, his brand has become very successful and well-known in the fitness community.

The  trademark has been used extensively in commerce since 2008 in the sale of gym and fitness services, fitness apparel and fitness equipment, including axles, farmer's handles, yokes, logs, and atlas stone molds, all over the world. The  trademark appears nationally in competitions, advertisements, fitness videos, fitness magazines and social media.

Applicant, Hylete seeks to register the  logo for clothing, particularly athletic clothing that is sold throughout the same channels, including at the same athletic events and to the same customers as Opposer. Applicant's current owners and employees worked very closely with Mr. Orlando for two years prior to the creation of Hylete. When Hylete was formed in 2012, not only was it a brand that would compete with Opposer through its sale of identical athletic apparel, but it did so by creating the  logo and blatantly attempting to use the consumer recognition and goodwill that Opposer had strived to achieve since 2008. Hybrid opposes registration because the  logo, when used in connection with Applicant's clothing goods, is likely to cause, and has caused, confusion with Opposer's widely known and famous 

trademark used and registered in connection with Opposer's popular clothing, athletic gear and workout equipment. Consumers seeing Applicant's  logo, will, have already and continue to, mistakenly believe that Applicant's goods originate from Opposer, are related to or approved by Opposer, or associated with Opposer's well-know and popular  trademarked goods, when in fact it is not.

## **II. DESCRIPTION OF THE RECORD**

Pursuant to 37 C.F.R. § 2.122, the record includes the pleadings in this proceeding, the file history of Applicant's application, and Opposer's pleaded registered  trademarks. Objections to Applicant's Testimony and Exhibits are attached hereto as Appendix A.

The following additional evidence was offered during the testimony periods:

### **A. Opposer's Evidentiary Record**

1. July 29, 2015 Testimony Deposition of Ian Jentgen ("Jentgen"), pp. 1-147, with Exhibits 1 – 7, submitted to the Board on September 11, 2015 (TTABVue #29).
2. August 5, 2015 Testimony Deposition of Matt Tuthill ("Tuthill"), pp. 1-61, with Exhibits 1 – 9, submitted to the Board on October 15, 2015 (TTABVue #30).
3. August 4, 2015 Testimony Deposition of Dale Saran ("Saran"), pp. 1-112, with Exhibits 1 – 10, submitted to the Board on October 15, 2015 (TTABVue #31).
4. September 4, 2015 Testimony Deposition of Jason Leydon ("Leydon"), pp. 1-33, with Exhibits 1 – 7, submitted to the Board on November 13, 2015 (TTABVue #32).
5. September 9, 2015 Testimony Deposition of David Castro ("Castro"), pp. 1-65, with Exhibits 1 – 8, submitted to the Board on November 13, 2015 (TTABVue #33).
6. July 29, 2015 Testimony Deposition of Syncere Martinez ("Martinez"), pp. 1-113, with Exhibits 1 – 9, submitted to the Board on January 13, 2015 (TTABVue #42).

7. September 3, 2015 Redacted Testimony Deposition of Robert Orlando (“Orlando”), pp. 1-183, with Exhibits 1-63, submitted to the Board on February 26, 2016 (TTABVue #49-54) (Orlando Dep. Parts 1-6)(unredacted version of Robert Orlando’s September 3, 2015 Testimony submitted to the Board on February 26, 2016 (TTABVue#55-58).

8. January 21, 2016 Rebuttal Testimony Deposition of Ian Jentgen (“Jentgen Rebuttal”), pp. 1-32, with Exhibits 8-11, submitted to the Board on March 4, 2016 (TTABVue #59).

B. Applicant’s Evidentiary Record

1. October 27, 2015 Testimony Deposition of Abbe Guddal (“Guddal”), pp. 1-32, with Exhibits A-E, submitted to the Board on December 8, 2015 (TTABVue #34).

2. October 27, 2015 Testimony Deposition of James Wardlow (“Wardlow.”), pp. 1-53, with Exhibits A-L, submitted to the Board on December 8, 2015 (TTABVue #35).

3. Wardlow Dep. Exhibits N-Q, submitted to the Board on December 8, 2015 (TTABVue #36).

4. October 29, 2015 Testimony Deposition of Ron Wilson (“Wilson”), pp. 1-175, submitted to the Board on December 8, 2015 (TTABVue #37).

5. October 29, 2015 Testimony Deposition of Garrett Potter (“Potter”), pp. 1-20, submitted to the Board on December 8, 2015 (TTABVue #38).

6. October 28, 2015 Testimony Deposition of Jennifer Null (“Null”), pp. 1-65, with Exhibits 1-13, submitted to the Board on December 8, 2015 (TTABVue #39).

7. October 28, 2015 Testimony Deposition of Matt Paulson (“Paulson”), pp. 1-85, submitted to the Board on December 8, 2015 (TTABVue #40).

### **III. STATEMENT OF THE ISSUE**

The issue presented in this opposition is whether the Board should refuse registration of Applicant's  logo because it so resembles Opposer's  trademarks that when used and registered in connection with Applicant's goods, it will likely cause confusion, cause mistake, or deceive pursuant to *Section 43(a) of the Lanham Act*, 15 U.S.C. § 1125(a).

### **IV. STATEMENT OF THE FACTS**

#### **A. Opposer's Trademarks and Registrations**

Opposer's  trademark symbolizes the letter "H," the first letter in "Hybrid Athletics." (Orlando 25:19-26:7; 27:21-23).

Opposer filed a federal trademark application for the  trademark on July 2, 2013, Serial No. 86000809, in connection with "Conducting fitness classes; Health club services, namely, providing instruction and equipment in the field of physical exercise; Personal fitness training services and consultancy; Physical fitness instruction" in class 41. (Notice of Opposition, para. 4, Ex. A (TTABVue #1). The application matured to registration on February 11, 2014, Registration No. 4480850, claiming a date of first use in interstate commerce at least as early as August 1, 2008. (*Id.*) Opposer's registration No. 4480850 is currently valid and subsisting.

Opposer filed another federal trademark application for the  trademark on February 21, 2014, Serial No. 86199948, in connection with "bottoms; headwear; tops" in class 25. The application matured to registration on September 23, 2014, Registration No. 4609469, claiming a date of first use in interstate commerce at least as early as December 31, 2008. (See

TTABVue#1, para. 2-3, claiming use of the  trademark on fitness equipment and athletic apparel). Opposer's registration No. 4609469 is currently valid and subsisting.

In addition to clothing and fitness services, Opposer also uses the  trademark on a variety of gym equipment, including but not limited to atlas stone molds, axles, farmer's handles, yokes, and logs which are sold not only in the U.S., but worldwide. (Orlando 48:19-52:5; 52:21-53:23; 55:8-60:2; 63:16-66:16; Exs. 2 (and the exhibits attached thereto), 5, 8, 9, 10, 11, 12, 13, 14, 15, 29, 41, 57); *see also* (Jentgen 62:22-63:12). Opposer has been using the  trademark on such equipment since at least as early as November 2010. (Orlando 64:5-18).

#### B. CrossFit and its Rapid Growth

CrossFit is one of the fastest growing sports and exercise programs not only in the U.S., but worldwide with millions of followers, participants and teams across the globe. (Orlando 5:19-6:14; Ex 2, ¶ 3) “On average, a new CrossFit licensee [affiliate gym], opens every two hours and 24 minutes throughout the day.” (Saran 20:14-21:4). “CrossFit was an underground movement for a long time and it kind of was counter culture.” (Saran 61:10-62:20); *see also* (Martinez 24:2-15); (Orlando 84:14-86:3). Starting as a niche workout program around 2005, the first ever CrossFit Games were held in 2007 on a ranch owned by the parents of Dave Castro. (Castro 14:17-21); (Saran 25:14-18). The attendance of these Games in 2007 was a mere 125 people, inclusive of competitors and spectators. (Castro 14:18-15:12) Since that time, the CrossFit Games have grown rapidly in size each year, and now have numerous events leading up to the actual Games, such as the Open, Regionals, and the Invitational. (Castro 13:11-15:23). Last year, the CrossFit Games tallied in approximately 270,000 participating athletes, not including the spectators. (Castro 15:21-23); (Saran 23:11-24:13); (Jentgen 84:3-11). The CrossFit Games are now considered the “Superbowl of CrossFit.” (Orlando 42:9-43:1).

In 2005, CrossFit had twenty to thirty affiliated gyms, now there are approximately 13,000. (Castro 13:11-25). When CrossFit started, it was conducting one Level 1 Certificate Courses a month, which allows an individual to coach CrossFit and open an affiliate gym, now it's conducting 15 to 20 courses per weekend. (Castro 14:1-13). By 2009 to 2010, CrossFit was rapidly becoming known throughout the world and gaining momentum in the mainstream fitness world, and caught the attention and support of large well-known companies such as Reebok and ESPN. (Castro 15:10-12). In fact at this time, "CrossFit had been shunned by a lot of the bodybuilding community," and mainstream fitness communities and it was not until Mr. Orlando's fame provided him the opportunity to appear in 2011 in Muscle & Fitness Magazine, as described in more detail below, that CrossFit had its first large exposure to the mainstream fitness and health world. (Saran 61:10-63:22; Ex. 4); (Orlando 84:3-86:3).

CrossFit and the CrossFit Games, like many other largely promoted sports events, has developed its own economy. (Saran 27:4-29:10, 39:21-40:25). The CrossFit Games have live broadcasts on ESPN, to which it sells promotional advertising space during those broadcasts (Saran 27:21-28:1). CrossFit also sells physical advertising space at CrossFit events and competitions for vendors and sponsors to advertise and sell their goods. (Saran 28:2-16). CrossFit has become a global, multibillion dollar economy that has doubled roughly every 18 months within the last 10 years. (Saran 29:2-10). Along with CrossFit's growth, Mr. Orlando's brand also grew and he became a household name in the CrossFit community.

C. Popularity of Robert Orlando and Promotion of the  trademark and the Goods Connected Therewith

"[I]f somebody said they didn't know who Rob Orlando is and they were in the CrossFit Community, I'd wonder if they'd been in prison or on a deserted island," according to Dale

Saran, general trademark counsel for CrossFit and a highly involved individual in the CrossFit community. (Saran 46:9-12). In the CrossFit Community, Mr. Saran would rank Mr. Orlando's  trademark in the top 10 most recognizable marks and would have ranked it even higher back in 2011 at the peak of Mr. Orlando's athletic competition years. (Saran 77:16-79:8; Exs. 2, 4).

Hybrid Athletics is owned and operated by Robert Orlando and is a CrossFit affiliate gym. Mr. Orlando is responsible for all aspects of the business, including advertising, sales and finances. (Orlando 5:17-18, Ex. 2 ¶1). Mr. Orlando's passion is Hybrid Athletics, and the training methods of CrossFit and Strongman. (*Id.*, Ex. 2, ¶2). Opposer's training services include Strongman and CrossFit methods and reach a diversified group of people from police academies, tactical operation teams, and elite athletes, to children and the elderly. (*Id.*, Ex. 2 ¶3). The methods of this training are designed to have universal scalability which has led to its vastly growing and dedicated user base, along with large corporate sponsors investing millions into the sport. *Id.*; *see also* (Castro 15:10-17:6).

Since 2008, Opposer has also sold, promoted, and continues to sell and promote its apparel and physical fitness services bearing the  trademark through the Hybrid Athletics gym, through the websites, [hybridathletics.net](http://hybridathletics.net) and [hybridathleticsapparel.com](http://hybridathleticsapparel.com), social media, at CrossFit Strongman training courses, at CrossFit competitions, including the CrossFit Games, throughout the U.S., charity events, and/or through vendors such as Rogue Fitness. (Orlando 49:21-53:10, 57:4-58:13, 93:8-98:15; Ex 2, ¶¶7-8, 8, 16, 27, 48-55, 57); *see also* (Jentgen 84:12-86:3). Rogue Fitness is the "Amazon.com" of CrossFit apparel and gear, worth hundreds of millions of dollars. (Saran 28:8-13; 37:13-38:17). If one is interested in purchasing any fitness equipment, including CrossFit gear, they will go to Rogue.com. Rogue started out selling pull-up rings and jump

ropes and is now a global headquarters from purchasing all things CrossFit. (Castro 17:7-19:8); *see also* (Saran 28:8-13; 37:13-38:17)

### **1. Robert Orlando Gains Notoriety as a Strongman and CrossFit Competitive Athlete**

From approximately 2005-2010, Mr. Orlando was competing as a Strongman athlete in various events every three to four months. In his last Strongman event, Viking Fest in 2010, Mr. Orlando took first place all the while promoting his Hybrid Athletics and  trademark by wearing such branded clothing since 2008. (Orlando 22:11-22; 70:21-72:18, Ex. 17).

In 2006, Mr. Orlando was introduced to CrossFit (Orlando 23:6-25:1) and between 2009 and 2011, Mr. Orlando was a competitive CrossFit athlete. In 2009, 2010 and 2011, Mr. Orlando competed and placed in the CrossFit Games. (Orlando 43:23-46:1; Ex 2 ¶¶10, 6, 7). He placed top three in the CrossFit Northeast Regional Qualifier in 2009, 2010 and 2011, including winning the Northeast Regional in 2010. More impressive, Mr. Orlando placed 22<sup>nd</sup> and 15<sup>th</sup> in the CrossFit Games in 2009 and 2010. (Orlando 44:20-22; Ex. 2 ¶¶10 -11). In the 2009 and 2010 Games, Mr. Orlando continuously sold, promoted and wore clothing articles bearing his  trademark. (Orlando 43:23-44:3; 44:23-45:3; 47:4-49:11). According to Mr. Castro, the director and face of the CrossFit Games, Mr. Orlando was “definitely one of the superstars and one of the more seen athletes” within the CrossFit community, all the while he was competing and growing his brand. (Castro 26:6-28:4; 34:8-35:6). When asked about his opinion on how well-known Mr. Orlando’s  trademark was between 2008 and 2012, Mr. Castro explained,

Very well-known because of Rob, and that’s the thing. Like, Rob was one of the premier athletes during that time frame, and like it or not in our community...if you’re an athlete and you’re a star athlete, you get a lot of attention, and not ever from us [CrossFit] but from the community. The community demands it. They want to know what they are doing. The community wants to know how that athlete trains. (Castro 34:8-21).

Leading up to the CrossFit Games in 2010 and 2011, the  trademark was displayed in abundance and prominently featured on clothing and apparel and promoted in videos and other CrossFit advertisements. (Orlando 71:8-80:9; Exs. 2 ¶¶11-14, 17-21). For example, CrossFit featured Mr. Orlando as a top ten athlete for which he was promoted in numerous videos posted online leading up the CrossFit Games which included the  trademark. (Orlando Dep. *Id.* and Ex. 2 ¶12) Mr. Orlando was also featured in a Hi-Temp Weight Equipment commercial that aired at the 2010 CrossFit Games, again featuring him in apparel bearing the  trademark. (Orlando 69:8-70:17; Exs. 2 ¶13, 16, 17). These videos, including this commercial are still featured on Crossfit's YouTube channel today. (Orlando 70:3-5). Mr. Orlando, on August 24, 2011 was also featured on Fox News, while wearing the Hybrid Athletics shirt featuring the  trademark in a segment on CrossFit. (Orlando 155:11-157:11, Ex. 56); (Leydon 14:15-15:14)

While Mr. Orlando was training and competing, he was filming many of his workouts and performances at the competitions. In 2008, Mr. Orlando began sending videos of his training sessions and workouts to CrossFit and CrossFit began posting them on its official website, [www.crossfit.com](http://www.crossfit.com), and its CrossFit YouTube channels. (Orlando 30:3-33:22); *see also* (Castro 26:6-28:4). These videos included Mr. Orlando breaking the boundaries of CrossFit and breaking new records of various CrossFit traditional workouts. (Jentgen 30:21-32:3, "...So it would be workouts, and Rob's were always eye-catching, because they just distinguished themselves from other workouts...he put his own spin on it. He always went heavier...") Mr. Orlando was featured all the time on CrossFit's website and YouTube channels "because of his exploits and because of what he was able to do. At the time he was one of just the pure strongest Crossfitters [CrossFit] had ever seen and so he was highlighted all the time." (Castro 26:14-18,

27:9-25, 28:1-4) These videos not only caught the attention of CrossFit Inc., but of many hundreds of thousands of people that viewed them worldwide. The viewers could not believe the physical capabilities of Mr. Orlando; he was “a monster.” (Tuthill 13:17-14:20); *see also* (Orlando 74:20-75:16; Exs. 18, 19, 20, 21, 23)(stating “...people recognize it and come to me and say that video is – it’s the most insane thing that I’ve ever seen or it’s the reason I got into CrossFit...”); *see also* (Jentgen 30:21-32:3). Mr. Orlando also sent videos of his competitions, for example from Viking Fest, to CrossFit who, requested first rights to these videos in order to post them on its website and YouTube channels. (Orlando 77:23-78:16).

Many of Mr. Orlando’s videos started and/or ended with the  trademark. (Orlando 71:3-7). Most of the videos were taken at Hybrid Athletics gym in front of the wall bearing the large  trademark or a large pegboard bearing the  trademark (Orlando 74:11-22; Ex. 18) (Jentgen 32:8-34:8; 62:9-63:13; 86:8-25, Ex. 5). The videos really helped Mr. Orlando build his personal following and as a result, his brand. (Orlando 82:14-83:20; Exs. 18-23); (Jentgen 52:11-54:8).

Mr. Orlando’s early video posts on the CrossFit website and YouTube are significant because these were the only online platforms featuring and advertising CrossFit before other social media sites such as Facebook, Twitter and Instagram were created. If someone wanted to connect with CrossFit, they had to visit the official website or YouTube channels. (Orlando 31:23-32:11) Mr. Orlando was a sensation. Millions of viewers watched his videos and read his CrossFit Journal entries on crossfit.com. (Orlando 72:4-74:10; Ex 18) Consumers came to recognize and support Mr. Orlando as a competitor and his Hybrid Athletics brand and Opposer’s merchandise sales were on the rise. (Orlando 72:4-18, 150:12-156:11; Exs. 17-18; 55, 56) (Jentgen 33:21-34:15, 75:3-77:20).

CrossFit's, Opposer's and Mr. Orlando's personal YouTube channels continue to host these popular videos featuring Mr. Orlando with the  trademark on his clothing and/or appearing elsewhere in the videos. (Orlando 82:21-83:20; 147:1-148:9; Exs. 48-53).

Mr. Orlando, through his successful career at competitions, was sponsored by multiple CrossFit clothing and fitness equipment brands and distributors who did and continue to sell goods bearing the  trademark. (Orlando 55:23-58:2; Ex. 2 ¶¶19-22) These sponsors and distributors are some of the largest names in CrossFit apparel and equipment, (*Id.*); (Saran 28:2-13, 37:9-17) and they too post videos of Mr. Orlando on their websites. (Orlando 147:2-148:9, Exs. 48-52).

Mr. Orlando's huge popularity and fame allowed him to break beyond CrossFit. For instance, Mr. Orlando along with the  trademark was featured in the July 2011, September 2011, and March 2012 issues of Muscle & Fitness magazine. (Orlando 83:21-86:3; Exs. 24-26); (Tuthill 20-21; Exs. 4, 5). Mr. Orlando broke into Muscle & Fitness due to his popularity as a high-level CrossFit athlete. (Orlando 84:4-88:5; Ex. 24); *see also* (Saran 59:22-60:20; Ex. 4); (Tuthill 11:18-12:19; Ex. 2); (Martinez 57:2-4, 58:10-60:8; Ex. 5) (According to Mr. Martinez the Muscle & Fitness article was the "biggest thing happening in Crossfit."). Mr. Orlando was chosen to be represented in the magazine because he "was emblematic of the shift that was happening in fitness..." Mr. Orlando "was pretty special. And it was pretty clear that, yeah, we needed to [] have Rob do the story." (Tuthill 13:2-16, 13:17-15:11). The July 2011 article, titled "THE KING OF CROSSFIT," was about Mr. Orlando and his Hybrid Athletics gym. *Id.* ¶28. The  trademark was prominently displayed in photos over six pages. *Id.* The monthly readership of this magazine reaches practically seven million people. (Orlando 90:14-99:4; Ex. 2 ¶29); (see more on Muscle & Fitness below, Section IV(c)(4)).

As a result of Opposer's hard work, Hybrid Athletics gym is now a "destination" location for people in the CrossFit community. People will go Hybrid Athletics from all over the world to see and workout in front of the iconic  that appeared in Mr. Orlando's videos. (Orlando 50:9-51:6); (Jengtgen 87:2-90:3; Ex. 5); (Martinez 46:10-47:15; Ex. 2). Mr. Leydon testified, "that [the  trademark] is probably one of the most recognizable logos I think in the CrossFit world. I feel like no matter where I go, especially back then, when he [Mr. Orlando] first came about it, and then Rob was at the CrossFit Games, tons of people had the Hybrid H shirt, Hybrid Athletic shirt on with the H as kind of like the emblem everywhere, and I would always see that whether I was in California or Texas or anywhere else, I always bumped into people that had some sort of [] Hybrid H shirt on." (Leydon 17:10-18:16).

## **2. Robert Orlando - Owner of Hybrid Athletics and Seller of Clothing and Equipment**

Since 2008 the  trademark has been used extensively and continuously in conjunction with the sale of physical fitness services and apparel in the fitness industry. (Orlando Ex. 2 ¶7)

In 2008, Mr. Orlando opened Hybrid Athletics in Stamford, Connecticut. Hybrid Athletics is a functional fitness gym that became a CrossFit affiliate in 2009. (Orlando 29:25-34:9). A wide variety of services are offered by Mr. Orlando through Opposer, including CrossFit training, Strongman training, personal training, and multiple fitness classes. Opposer has sold and sells apparel and other goods, such as shirts, hoodies, hats, socks, shorts and coffee mugs at the physical location of the Hybrid Athletics gym, online at [hybridathletics.net](http://hybridathletics.net) and [hybridathleticsapparel.com](http://hybridathleticsapparel.com) and through other online venues and companies such as Rogue Fitness. (Orlando 48:19-49:11, 50:2-53:23, 57:4-59:3, 93:5-95:8, 157; Exs. 2, 5, 8, 11, 12, 13, 57); (Jengtgen 47:3-48:11, 51:12-54:11; Exs. 3, 4). Opposer also sells stone molds, and other

fitness equipment, each bearing, and therefore creating a prominent  on the stones they create – a hugely popular item amongst CrossFitters and CrossFit affiliate gyms. (Orlando 28:5-10, 48:19-49:11; 54:9-14; 58:4-13, 63:16-19, 64:5-65:4, 97:5-98:15, 157, Ex. 11, 12, 14, 15, 27, 57); (Jentgen 43:4-45:6, 46:10-47:1); (Leydon 19:3-23; Exs. 2-3). Mr. Castro, who travels to thousands of CrossFit gyms testified that he sees Mr. Orlando’s atlas stones bearing the  all the time, “Those, I see a lot...” (Castro 33:11-34:1) Mr. Saran, General Counsel for CrossFit testified that, “It’s not uncommon for me to drop in on gyms and find Rob’s stones with the logo...” (Saran 44:18-21) “...So you can go to a lot of CrossFit Gyms, drop in, and there’s decent chance that they might have some stones...and so, yeah, I’d say – yeah, the dude’s [Mr. Orlando’s] stones are rolling around a lot of CrossFit gyms around the world.”) (Saran 45:8-17). Mr. Leydon, owner of CrossFit Milford and trainer of winning CrossFit athletes testified that, when discussing his travels for CrossFit Level 1 certifications, in 2012 and 2013, “I see the Hybrid H everywhere. Even to this day. Doing Level 1’s, doing CrossFit running endurance seminars, through all those years, this [, the  trademark,] I think was probably the most distinguishable logo in CrossFit.” (Leydon 18:2-16, 19:14-23).

When Mr. Orlando opened Hybrid Athletics, he realized that in order to train others via methods of Strongman and CrossFit, he was going to customize certain equipment and bring them to scale for users of all different fitness levels. (Orlando 38:17-40:23). Mr. Orlando designed prototypes for equipment such as, yokes, logs, farmer’s handles and axles, *Id.*, and sells these items through the Hybrid Athletics website and through Rogue Fitness, [REDACTED] [REDACTED]. Mr. Orlando also sells his stone molds through his own websites and Rogue’s website, however, he fabricates them himself and then sells them to Rogue at wholesale, who then sells them at retail. (Orlando 57:4-58:13; Exs. 9-10); (Jentgen 46:10-47:1).

Mr. Orlando's first sale of his stone molds was on November 18, 2010. (Orlando 64:2-67:4; Exs. 11-15). Mr. Orlando produces 13 different size stone molds, plus a funnel, all of which are branded with the  trademark (Orlando 61:5-11); (Jentgen 44:10-45:6; 62:22-63:13, Ex 3, 5). The stone molds have been purchased from consumers in almost every state and in 1562 zip codes. (Orlando 64:14-18; Ex 12); (Jentgen 75:22-19). Not only are these molds found all over the country and in most CrossFit affiliate gyms, (Castro 33:8-34:7) and (Saran 45:1-17), they can be found around the world. (Saran 44:8-45:22; Ex. 2). This means that practically every time someone in a CrossFit gym in the U.S. picks up an atlas stone, it has a huge  trademark molded right into the stone itself. The stone is normally lifted right up to a person's shoulder and therefore, the  trademark is impossible to miss. And these stones can be huge, 150 pound stones and up to 18 inches in diameter and can come in a set of 8— something visually hard to avoid. (Orlando 62:11-63:15, Exs. 10, 13-15); (Jentgen 44:10-21).

While competing at the CrossFit events in 2010 and 2011, as described above in Section IV(c)(1), Mr. Orlando was also a vendor as he was “trying to run and grow [his] brand.” (Orlando 52:6-53:23). For many vendors, the CrossFit Games and regional events, are the single biggest days for selling shirts and apparel. (Saran 55:21-58:12); (Orlando 53:6-10). Even for large vendors like CrossFit Inc. and its co-branded gear with company sponsors like Reebok, these events are huge selling events and they normally sell out of inventory. (Saran 57:3-58:4). In 2010, Mr. Orlando had his first vendor booth set up at regionals held in Albany, NY. Because of his popularity, he received a lot of attention from consumers and fans and as a result sold a lot of inventory. (Orlando 51:7-53:10). At the 2011 CrossFit Games, in one weekend, Opposer sold approximately [REDACTED], with all shirts bearing the  trademark. (*Id.*). During the 2010 and

2011 CrossFit competitive seasons, Opposer sold approximately [REDACTED] bearing the  trademark. (Orlando 55:5-22, Ex. 2 ¶ 17).

Opposer also heavily markets on social media. As referenced in Section IV(c)(1) *supra*, Opposer submits videos to CrossFit to post on its website and YouTube channels, but Opposer has also advertised its brand through its own social media accounts, including Facebook, Twitter, Instagram, and YouTube (Orlando 68:14-69:3, 95:9-96:6; 146:4-150:11, Exs. 48-54); *see also* (Jentgen 79:25-82:18). For example, Opposer's Facebook page, featuring the  trademark and maintained since December 2011, surpasses eight thousand (8,000) "likes" to date. Mr. Orlando's Facebook page, maintained since November 2011, featuring apparel, fitness equipment and gym services bearing the  trademark surpasses thirty thousand (30,000) "likes". (Orlando Ex 2 ¶¶33-35). Also, between Opposer's YouTube Channels, with thousands of subscribers, and third party videos, including those featured on CrossFit's YouTube Channel featuring the  trademark, (Orlando Ex 2 ¶¶36-38), these videos have been viewed well over 2 million times. (Orlando 28:3-10; Ex 2 ¶38).

Opposer also sells a lot of inventory at his CrossFit Strongman Seminars (described in more detail below). (Orlando 92:10-93:18, 96:16-98:15; Ex. 27). These Seminars are advertised through the CrossFit website (Castro 29:5-14). When Mr. Orlando, or his head trainer from Hybrid Athletics travels to other gyms for seminars or trainings, whether in the U.S. or around the world, they always see Opposer's equipment and clothing. (Jentgen 64:9-68:3)

For a long time, athletic shorts were one of Opposer's best-selling items. Through its prior sponsor JACO, Opposer and JACO produced and sold co-branded shorts. The co-branded shorts constantly sold out and were so popular that JACO could not keep up with Opposer's demand. (Jentgen 105:10-107:12); (Orlando 103:22-105:10); (Paulson 19:13-21:14, 23:11-24:4).

Opposer's clothing articles, such as its t-shirts, hoodies, shorts and hats retail from \$24.00 to \$60.00. (Orlando Ex. 57). Opposer's stone molds retail from \$80.00 to \$650.00 depending on the size of the mold or if a customer is purchasing a set. (*Id.*) Between 2011 and 2014, Mr. Orlando's revenue from online sales through just the Rogue website for selling stone molds bearing the  trademark totaled [REDACTED] (Orlando 54:3-14, Ex. 12); *see also* (Jentgen 42:23-43:3), and his revenue from online sales through just Opposer's website of apparel bearing the  trademark totaled [REDACTED]. (Orlando 54:17-21; 158:12-160:5, Exs. 58-63). In 2013, Opposer grossed [REDACTED] in sales between apparel, equipment, gym memberships and his training seminars ([REDACTED] of that total figure came from apparel sales). (Orlando 161:6-162:5).

Mr. Castro explained in his testimony that between 2008-2011 Mr. Orlando did

a very good job early on in making [the  trademark] a known logo in the community via competing in the CrossFit Games and all the videos I talked about where he was highlighted. He would be wearing his Hybrid shirt, which I could argue was one of the most popular shirts during that period because Progenics... [and] Rogue [weren't] doing many shirts, and Reebok wasn't even involved with us. So at this period you had CrossFit shirts and then you had people like [Mr. Orlando] who made shirts popular because they were star athletes." (Castro 30:2-21; Ex 1).

### **3. Robert Orlando - CrossFit Trainer**

Mr. Orlando is not only the owner of the Hybrid Athletics' CrossFit gym but he also personally trains competitive and non-competitive CrossFit athletes as well as other CrossFit trainers. (Orlando 92:5-94:12); (Saran 42:18-44:7); (Castro 28:5-29:23); (Martinez 48:9-49:23). In September 2011, after Mr. Orlando stopped competing at a professional level, he became a CrossFit Subject Matter Expert and started to personally run CrossFit's Strongman Trainer Courses, all while marketing the  trademark. (Orlando 92:5-94:12, Ex. 2 ¶¶23-25) Ian Jentgen, a person extremely familiar with CrossFit training and affiliate gyms, as he has

personally visited hundreds of such gyms, observed that “[a] lot of gyms are falling back on the implementation of Strongman movements and it’s becoming more and more prevalent as its related to the CrossFit Games, which is kind of its great marketing platform for CrossFit. And the prevalence of the Strongman movements has become more and more apparent in more recent years. So the [atlas] stones as a result are becoming more and more apparent. They are being used in competition more often. So if they’re being used in competition, the gyms want to have them.” (Jentgen 43:15-44:2).

While Mr. Orlando made his brand very popular as a star athlete, he continued, and still continues, to build his brand through education and training. He continues to make the  trademark relevant and well-known by wearing his branded merchandise at these Seminars. (Castro 27:19-28:4, 31:10-22). These training courses are not only taught in the U.S., but all over the world. In 2014 alone, [REDACTED] [REDACTED]. (Orlando 93:8-18). And between September 2011 and January 2014, Mr. Orlando [REDACTED] being taught throughout the U.S. (Orlando 96:12-23; Ex 27). Each of these attendees are exposed to the  trademark and many purchase, if they do not already own,  trademark apparel. (Orlando 96:16-98:15). As shown by these numbers, the demand for Mr. Orlando’s seminars increases yearly and they have contributed towards the continuing recognition of the  trademark. (Orlando 93:8-18).

Mr. Orlando teaches others how to “implement safely and how to lift something extraordinarily heavy that you can’t get your hands around [, like yokes, prowlers (sleds), Atlas Stones,] the way you would just reach down and put it around a nice 22-millimeter diameter

barbell. It's a different thing. And so Rob's the expert in that field [for CrossFit].”(Saran 49:5-50:6); *see also* (Jentgen 38:6-41:23).

CrossFit posts and advertises these seminars on its website and people from anywhere, interested in these types of training courses can sign up, including gym owners and instructors. (Saran 50:7-54:10). These courses are accredited by the American National Standards Institute (“ANSI”), which is a technical accreditation company. (Saran 51:16-52:18). Every year the CrossFit seminars and training programs are audited and go through the entire accreditation process. *Id.*

Mr. Orlando and his staff have visited hundreds of gyms, whether in the capacity as a seminar instructor, promotional tours, or just stop by for a workout, and each time they all wear the  trademark. (Orlando 81:11-82:20; Ex. 23; 93:8-95:8, 161:9-19); (Jentgen 63:14-68:3; Ex. 3). Orlando is a “well-regarded, well-known person. He's a fixtures in the [CrossFit] community.” (Saran 44:8-17).

#### **4. Robert Orlando – Muscle & Fitness Columnist**

As discussed in greater detail *supra*, Section IV(c)(1) in 2011, Mr. Orlando was first featured in Muscle & Fitness Magazine. As a result of his featured article doing so well for the magazine, and because Mr. Orlando is “well known in the CrossFit circles,” he became the official writer of the CrossFit column for Muscle & Fitness. (Tuthill 15:12-18:9).

Since September 2011, Mr. Orlando has written a regular column, once a month, for Muscle & Fitness which regularly features the  trademark. (Orlando 89:8-90:11; Exs. 2 ¶¶31, 25, 26) (Jentgen 77:4-15); (Tuthill 16:10-18:9). Mr. Orlando has worked with Mr. Tuthill since the July 2011 publication of “KING OF CROSSFIT,” *see* Section IV(c)(1) *supra*, and regarding the submission, editing and publication of Mr. Orlando's monthly columns. Muscle & Fitness

has been in publication for approximately 75 years and is the “preeminent monthly fitness training magazine appealing to exercise enthusiasts and athletes of all ages...” (Tuthill 22:8-23:13; Ex 6). At the time of Mr. Orlando’s first articles, Muscle & Fitness reached practically seven million readers per month. (Orlando 90:22-91:10; Ex 2 ¶29.) (Tuthill 22:8-23:24; Ex. 6). Now with technology and more viewers of the magazine online, there are approximately eight million unique viewers of the magazine on a monthly basis. (Tuthill 24:5-25:24).

Being a writer for such a popular magazine has given Mr. Orlando and his famous  brand further notoriety and recognition. (Orlando 91:11-92:4).

D. Applicant Intimately Knew Opposer’s  Trademark Prior to Hylete Formation

Applicant admits that it was aware of the  trademark as early as 2011, well before Applicant’s claim of first use. (Paulson 14:15-24, 27:18-21) (Null 17:11-18); *see also* (Orlando 99:1-110:13). Ms. Jennifer Null, Hylete’s current Team Commissioner, testified to knowing Mr. Orlando as early as late 2009, that she was a fan of his, and that she watched his videos and used his website for ideas and other workouts. (Null 9:7-8). Mr. Paulson, Hylete’s current owner, testified to knowing Opposer and its trademarks since at least as early as 2010. (Orlando 99:15-19, 101:9-10); (Paulson 31:17-20); (Null 22:19-21). Through Opposer’s sponsorship with JACO Athletics, Opposer worked closely with Matt Paulson and Jennifer Null for two years to co-brand the  trademark on JACO athletic shorts. (Orlando 99:1-110:13, Ex. 2 ¶40, 28, 29). In fact, Mr. Paulson and Ms. Null were Opposer’s main contacts at JACO. (Orlando 99:15-19, 101:9-10); (Paulson 31:17-20); (Null 22:19-21).

In 2010, JACO clothing company sponsored Mr. Orlando due to his notoriety as a CrossFit athlete. At this time, Opposer and JACO also entered into the co-branding deal, where the  trademark was placed on JACO shorts. These shorts were a very large selling item for

Opposer. In fact, Opposer could not keep these shorts in stock. (Orlando 99:15-100:21, 103:22-104:10; Ex. 29); (Jentgen 48:20-49:6, 98:3-9; Ex. 4); (Null 24:11-17). Mr. Paulson and Ms. Null would assist Mr. Orlando with fulfilling orders for the shorts. (Orlando 101:9-25); (Paulson 14:25-15:12, 23:20-24); (Null 24:11-24). Mr. Paulson had abundant exposure to the  trademark because he kept a copy of the  trademark vector files to give to the screen printers who then printed the  trademark on the co-branded shorts. (Orlando 102:4-103:20; Exs. 28-30); (Paulson 21:11-14). Despite JACO not being able to fulfill Mr. Orlando's orders for shorts on multiple occasions, Mr. Orlando had a nice working relationship with Mr. Paulson and Ms. Null. (Orlando 103:22-104:2); *see also* (Paulson 26:20-23, 27:1-2)

However, in 2012, JACO and Opposer ceased all relationships with one another. (Orlando 105:9-10). Mr. Orlando and Mr. Paulson had a conversation while attending the Arnold Classic, one of the largest fitness expos in the world regarding signing the new deal with JACO. During that conversation, Mr. Paulson told Mr. Orlando that he, Ron Wilson and Jen Null were leaving JACO and going to start their own apparel company and invited Mr. Orlando to go with them and start a new co-branding relationship. (Orlando 105:11-107:23); *see also* (Paulson 26:10-12). Mr. Orlando said "send me mockups, send me a product line. What are you guys going to market? How are you guys going to fabricate it? Where is it going to be made? And if we're going to co-brand this stuff with Hybrid...I'd like to see what this is going to look like." (Orlando 107:6-14). Opposer contacted Mr. Paulson on April 9, 2012 inquiring "...What's the name of your brand?" to which Mr. Paulson replied "...Later this week I'll give you a name and logo, and we'll walk through a brief presentation..." (Orlando 108:4-19, Exs. 31, 37).

In April 2012, Opposer learned of Applicant's plans to promote, advertise, distribute, offer for sale and sell clothing and apparel bearing a mark confusingly similar to its 

trademark through a company named “Hylete.” (Orlando 108:20-109:21; Exs. 31, 32). The first time Opposer saw the proposed  logo, Mr. Orlando immediately wrote to Mr. Paulson stating, “Hey Matt, I spent some time looking at the Hylete logo and I must say that it looks eerily similar to the Hybrid Athletics image. The font on the text is identical. Also, Hybrid Athletics is the long version of your brand name. This is odd, no?” (Orlando 108:20-109:21, Ex 32-34); *see also* (Paulson 42:3-20). Mr. Paulson wrote back stating, “...Hylete is a condensed version of Hybrid Athlete...However, I can see your concern” (Orlando 109:21-110:20, Ex 32); (Paulson 79:15-23). Mr. Orlando “decided... the second that [he] saw the logo that [his] relationship with these guys was over because they had clearly hijacked [his] logo.” (Orlando 110:21-111:13). Moving forward, Mr. Paulson attempted to contact Mr. Orlando further, but Mr. Orlando did not respond because he did not want to conduct any business with Applicant or his prior contacts from JACO. (Orlando 119:10-121:14, Exs. 35-37). In a March 11, 2013 email, Mr. Paulson even admitted that they were experiencing consumer confusion and stating, “...with any new logo, people associate that logo with something they have already seen or are familiar with until that new logo takes a life of its own. Our logo is no different, ***I won’t lie, in the beginning we had a few people say it looks like your logo...***” (Orlando 121:4-122:18, Ex. 37) (emphasis added).

E. Applicant’s  logo and Trademark Application

Applicant is a manufacturer of athletic clothing and apparel, which has been widely targeted at the CrossFit community. (Wilson 61:18-62:22, 63:18-19, 104:25-105:16, 106:14-23, 112:19-25, 158:1-9); (Orlando Ex. 32); (Paulson 74:13-75:20; Ex. Referencing Orlando Ex. 2).

Applicant alleges that it first used the  logo in commerce on April 9, 2012. (Notice of Opposition ¶6)(TTABVue#1)(Applicant’s Answer ¶6); (TTABVue#4).

Applicant's  logo symbolizes the letter "H," the first letter in "Hylete." The term "Hylete" was created by combining "Hybrid" with "Athlete." (Wilson 88:11-18); (Orlando Ex. 32).

Applicant filed a federal trademark application for the  logo on January 30, 2013, Serial No. 85837045, in connection with "Athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps" in class 25. (Notice of Opposition ¶6 ) (TTABVue #1).

Opposer filed this opposition against application Ser. No. 85837045, on October 16, 2013, Proceeding No., 91213057. (Notice of Opposition) (TTABVue #1)

F. Applicant's Consumers, Trade Channels and Goods for its  logo

Applicant manufactures and sells the exact same products as Opposer, it is offering these goods to the exact same consumers, i.e. fitness consumers and in particular CrossFit consumers, (Orlando 112:10-116:20, Ex. 32, 33, 34); (Wilson 61:18-62:22, 63:18-19, 104:25-105:16, 106:14-23, 112:19-25, 158:1-9), and it markets these goods in the same manner, i.e. the internet through social media outlets, such as Facebook, Instagram, and YouTube, its website, hylete.com, through affiliate gyms, many of which are CrossFit gyms, and events such as the CrossFit Games and Regionals. (Orlando 112:23-114:3; Ex 32); (Wilson 93:8-17, 158:1-9); (Null 37:12-21).

Applicant currently sells and/or intends to manufacture and sell men's and women's performance apparel including but not limited to shirts, socks and shorts. In addition, Hylete manufactures and sells a convertible backpack and equipment bag. (Wilson 95:9-13, 104:12-13; Ex. 28 – listing the goods that are sold by Hylete); (Paulson 74:13-75:20; Ex. Referencing Orlando Ex. 32) . Applicant markets on all the same social media that Opposer does and has targeted its marketing to the CrossFit community. *Id.* Ian Jentgen, Opposer's head trainer has

even received selected advertisements from Applicant on his Facebook page, stating the page was “sponsored by Applicant.” (Jentgen 97:18 -102:2).

Applicant, also participated as a vendor at CrossFit events (Null 37:12-21); (Paulson 46:5-9, 47:6-9), that is until the company was banned from such future events in 2013. (Saran 66:20-71:11, 87:3-89:20, 92:23-95:2; Exs. 7-10)(Mr. Saran stated, “We gave Hylete whatever its fee had been and told them they weren’t going to be welcome at our events anymore.”) For example, along with Opposer, Applicant set up its booth at the 2013 CrossFit regionals in Canton, Massachusetts. (Orlando 141:6-142:18) (Saran 67:8-15)(Castro 37:11-40:23)(Mr. Castro first saw the Hylete mark at a vendor booth at the 2013 CrossFit regionals in Texas).

Applicant actually attributes its growth in the CrossFit community to “guys like Rob” – their “strategic partners” who were CrossFit affiliate owners, trainers and athletes. (Paulson 32:21-34:5). Applicant obviously saw the value that Mr. Orlando and the Hybrid Athletics brand could add to its growth and therefore wanted to sign Opposer as a Hylete strategic partner.<sup>1</sup>

#### G. Instances of Actual Confusion Encountered Frequently by Opposer

Ever since Opposer’s expressed concern about the  logo in 2012, an abundance of instances of actual consumer confusion have and continues to occur. Opposer has encountered and entered into numerous conversations where consumers, attendees of his gym, attendees of his seminars and attendees of CrossFit competitions have all expressed confusion between Opposer’s and Applicant’s brand and design logos. (Orlando 123:2-125:25, 141:12-142:18). Opposer has also witnessed consumers who thought they purchased shorts or t-shirts to support

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<sup>1</sup> “You know, many people ask us, you know, how we were able to grow so fast. And, you know, on my side, on that marketing and the sales side, Hylete was able to grow quickly because we were able to leverage this numerous number of strategic partners out there. Whether they were magazine-based or trainer-based, et cetera, guys just like Rob – guys just like Rob, who have their own – who have developed their own training tools, who are out there teaching other trainers and certifying people...So when I left JACO...I reached out to [Rob].” (Paulson 33:14-34:5)

Opposer, but who had actually purchased such merchandise from Applicant. (*Id.*) For example, Mr. Orlando explained,

“[a] guy comes into [Hybrid Athletics] gym for his tenth or twelfth visit...I was just at my attorney’s dealing with that Hylete stuff, and he says, well, what’s going on there?...that’s your apparel...and [Mr. Orlando] was like ‘no. they have nothing to do with me.’ That is one example of thousands, thousands that happen to me, and every time it happens, its like a kick in the gut...I’m at the games. I’m at the regionals, I’m at a vendor booth. I’m walking through an airport and somebody walks up to me and says, ‘hey, dude, I just picked up your new shirt’ and they have got the Hylete shirt on...its not just one-offs...this stuff happens everyday...”

(Orlando 124:7-125:25) “[Hybrid] is [REDACTED]

[REDACTED]. Because people are, based on my experience of people coming up to me and showing me the logo and saying, look, I just bought your pair of shorts...My first comment to [Matt Paulson in April 2012] was I think this [the logo] is too similar...” (Orlando 144:2-20).

Due to the endless comments Mr. Orlando receives and instances where he witnessed consumers purchasing Hylete clothing thinking it is Opposer’s, “[t]he consumer has been led to believe that Hylete is an extension of Hybrid Athletics. The logos are similar enough that its direct and immediate confusion, and I see it on a daily basis.” (Orlando 129:21-130:13). Confusion is witnessed everywhere by Mr. Orlando and Opposer’s representatives, including on social media. For instance, on Instagram, consumers have used hashtags in the following manner, “at Hybrid athletics at Train Hylete.” (Jentgen 93:4-97:17; 100:7-104:9) (Mr. Jentgen explaining the confusion being caused by Hylete’s social media campaign as well as individual instances of consumer confusion and customers buying Hylete apparel, thinking that it was from Hybrid); *see also* (Leydon 23:24-24:14).

Opposer has also received numerous messages, emails, and social media posts from consumers who believe there is a relationship or affiliation between Opposer and Applicant

because the marks are so similar. (Orlando Ex 2 ¶49). The following examples are among the many messages and posts received by Opposer:

- On March 10, 2013, a man named Jessie Clay wrote to Mr. Orlando, “you should investigate HYLETE ...unless they r a branch of Hybrid they chicken hawked your logo...heads up.” (Orlando 129:10-23, Exs. 2 ¶47, 38).
- In May 2013 CrossFit Regionals, Ian Jentgen, head coach for Hybrid Athletics was assisting Mr. Orlando set up Opposer’s booth and saw the Hylete booth and logo for the first time. He asked Mr. Orlando “what’s going on here? Its like exactly us. Like are you involved with them?” (Jentgen 91:2-92:6) In his deposition, Mr. Jentgen stated, “I was confused. I thought he [, Mr. Orlando,] would have had some relationship with them...and we saw people who were confused throughout the weekend as to what was going on.” (*Id.*)
- On July 28, 2013 – Yusuke, a CrossFitter in Hawaii wrote this email to Mr. Orlando, “At the games, I see a lot of people wearing Hylete clothing and posting on Facebook. Does it have anything to do with Hybrid Athletics? The logo looks a lot like Hybrid and the name is very similar so was just wondering.” (Orlando 130:19-131:19, Exs. 2 ¶49, 39)
- At the 2013 Mr. Olympia Competition, Matt Tuthill, Deputy Editor of Muscle and Fitness (with knowledge of Mr. Orlando and the  trademark due to Mr. Orlando’s columns for the magazine, *see* Section IV(c)(4) *supra*) saw Hylete’s booth. He thought “that Rob Orlando had gotten himself a booth at the Olympia, but it did look slightly different, so I was curious about it...I saw it popping up in a couple social media feeds, things like that, took a screen grab and sent it to [Mr. Orlando], and then I said you licensed your Hybrid Athletic logo. You know, I was curious if he had entered into some kind of distribution deal.” (Tuthill 26:4-30:5, Exs. 7-9).

- On October 16, 2013 – Miki Carey, owner of Gardens Crossfit in Florida, purchased Hylete gear and then wore it to a seminar being taught by Mr. Orlando. She thought she was supporting Opposer. (Orlando 133:1-7). After Mr. Orlando explained that Hylete was not his company, Ms. Carey wrote the following follow-up email to Mr. Orlando, “Subject: hylete discussion” “Your conversation was actually helpful in knowing the difference between the logos/brands. It was very confusing at first, I completely thought they were one in the same.” (Orlando 132:20-133:15, Ex. 40)
- On December 5, 2013 – One of Opposer’s fans, Drake Rodriguez, posted the following on Opposer’s Facebook fan page, “How do [you] feel about Hylete athletics, basically copying your logo and name?” (Orlando 133:19-134:10, Ex 41).
- On December 24, 2013, Syncere Martinez, a long time CrossFitter, CrossFit affiliate gym owner, and acquaintance of Mr. Orlando, writes this email to Mr. Orlando, “Rob something has to be done about Hylete! It’s a blatant rip off of the hybrid Athletics brand! Not sure what can be done but the “H” and the term hybrid Athlete is something you have created in the CrossFit Community . . . the fact that they are flooding the Community with their Brand over yours is disrespectful in my opinion.” (Orlando 134:15-136:16, Ex 42)(Martinez 65:2-66:6, 68:7-76:17, 93:17-94:24<sup>2</sup>; Exs. 6, 7, 8)
- On January 21, 2014 – One of Opposer’s fans, Eric W. Lester, writes on Opposer’s fan page, “Is ‘Hylete’ associated with Hybrid Athletics? Their name and logo is more than a little similar but I can’t find anything on their site to indicate it.” (Orlando 136:20-137:17, Ex 43). After Mr. Orlando tells Mr. Lester there is no affiliation, Mr. Lester writes back, “Thanks Rob. So this is just more confusion.” (Orlando 137:16-17; Ex 43)

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<sup>2</sup> Mr. Martinez testified to observing other people’s confusion of the Hybrid and Hylete logos as well.

- On February 26, 2014, Zach Even-Esh, a CrossFit coach from New Jersey and featured on Crossfit.com writes to Mr. Orlando, “I chatted with a Hylete rep in Miami. I thought they were your apparel line. I know I saw you were working with them before. Just checking to see if this is legit. Don’t hesitate to reach out.” (Orlando 137:23-138:25, Ex 44).
- February 26, 2014 – Matt Tuthill, Deputy Editor of Muscle & Fitness Magazine again writes an email to Mr. Orlando, “Hey Rob, I follow Zach Even-Esh on Instagram, and he posted this photo the other day saying he was training with guys from a company called Hylete [picture posted of Hylete logo]... I wanted to ask you if you had licensed out the original Hybrid Athletics logo or sold it, because this thing looks almost identical. If not, I definitely thought you should know. Hope all is well.” (Orlando 139:6-140:11, Ex. 45)(Tuthill 28:2-8, Ex. 9).
- On November 6, 2014, Daniel Voros, a coach at Reebok CrossFit Nuremberg, who has also assisted Mr. Orlando organize a couple CrossFit Strongman seminars wrote, “did you know a copy of your brand means that you succeed . . . Here it is: <http://www.hylete.com>.” (Orlando 140:15-141:5, Ex. 46).
- Jason Leydon, owner of CrossFit Milford in Connecticut, who has known Mr. Orlando and the Hybrid Athletics brand since 2008 ordered shorts from Hylete and when he received them, co-branded with his gym’s logo, thought “it looks a lot like the Hybrid H. There was confusion. For myself, I didn’t see the Hylete H before I got the shorts with my logo on it. When I did get it, I thought that Rob had some sort of role in it because the Hs are similar...when my wife saw the shorts, again she thought Rob had took on some sort of clothing line because the Hs were very similar.” (Leydon 22:17-23:23; Exs. 6-7).

Still further instances of confusion have been experienced by individuals highly regarded and recognized in the CrossFit community:

- Dale Saran, In House Counsel at CrossFit Inc., and someone very familiar with all the brands marketed at CrossFit events, went to a CrossFit Regional event in 2013. (Saran 66:10-69:18, 73:7-77:7) He saw Applicant's booth next to Opposer's booth and thought that it was Opposer's new partner. He went up to Mr. Orlando and said "oh hey, congratulations, ...I guess that's your apparel line." (Saran 68:2-19). He further said to Mr. Orlando, while looking at the Hylete logo, "that's your logo." Mr. Orlando informed him it was not. (Saran 68:21-70:5). After Saran's encounter with Hylete at that event, CrossFit no longer contracted to have Hylete be a vendor at any events or be a part of CrossFit in any other official capacity. (Saran 70:7-71:11, Exs. 9-10). Mr. Saran explained that within the CrossFit community, the Hybrid "H" has been around a while and it was a well-known and rather distinct logo, as it did not look like any other mark anyone else was using. "It stood alone within our community just by virtue of how different it was then really anything else." (Saran 74:17-23).
- Dave Castro, the Director of the CrossFit Games, and who has attended almost every CrossFit event, went to a CrossFit Regional event in 2013, where he saw Applicant's booth and Applicant's logo for the first time. Mr. Castro approached an employee at the booth and asked, "Oh, Rob's selling here, is he here?" The people at the Hylete booth told Mr. Castro that "this isn't Rob Orlando's...this is a different company." (Castro 38:11-24) Ms. Null, Director of Sales at Hylete (Null 25:18-23), also testified to this occurrence,

...And Dave Castro who is the director of competition for CrossFit, comes by and just came up and said something to Keith. And from behind, I looked over and saw that Dave Castro is having this conversation with this kid Keith. And so as soon as he walked away, I went up to Keith and said, 'What did he say to you?' He said, 'He asked if we had an affiliation with Rob Orlando.' ... So once he told me that he asked that question I didn't even think to say, 'what did you say?' I went right up to Dave and said, 'Dave, just so you know, we have nothing to do with Rob Orlando.' (Null 38:15-39:6).

Mr. Castro continued his testimony by stating, “I thought it was weird because of the logo. I thought it looked exactly like this (looking at the  trademark) with minor—a few tweaks, but it definitely caused confusion when I saw it. I thought it was [Mr. Orlando], and I thought essentially he’d expanded his offerings for selling clothing.” (Castro 39:1-25). The confusion was in who was sponsoring, who held the booth and who was selling gear at the CrossFit regional. I was confused in that I thought it was his equipment or his gear...I thought it was his brand, Rob Orlando’s brand.” (Castro 40:3-23; Exs. 6, 7).

#### H. Damage to Opposer’s Brand Since the Introduction of Hylete

As a result of Hylete’s entrance into the market, Opposer’s clothing sales have been greatly affected. (Jentgen 102:3-21, 142:6-143:16). In 2014, right when Hylete started to make its big push in the market, Opposer started to see a dip in its clothing sales, [REDACTED]. (Orlando 54:17-19; 126:2-127:2; 159:16-20). In 2015, [REDACTED] (Orlando 127:3-129:6; 143:23-144:16; 159:19-20; 160:3-4). Mr. Orlando has expressed his concern with the presence of Hylete and the  logo, “If they can do this to my apparel business, if they decide to start getting into the equipment business...where they start making stone mold and start slapping their H inside some stone molds, [REDACTED].” (Orlando 127:3-129:6). Opposer has been harmed due to Applicant leading purchasers to Hylete’s products as opposed to Hybrid Athletics. (Jentgen 97:18-100:6).

#### V. OPPOSER HAS STANDING IN THIS PROCEEDING

Pursuant to 15 U.S.C. §1063(a), 37 C.F.R. §2.101(b), any person who believes that he, she or it would be damaged by the registration of a mark may file an opposition against the mark.

The opposer must have a “real interest’ in the proceeding, and a ‘reasonable basis’ for its belief that it would suffer some kind of damage if the mark is registered.” TBMP 309.03(b). Here, the  logo is confusingly similar to the  trademark, thus causing damage to Opposer.

Opposer is the owner of two valid and subsisting federal registrations for the  trademark as stated above in Section IV(a) *supra*. Opposer has also shown abundantly, through its testimony and Applicant’s recognition in its testimony, that Opposer has established prior nationwide use in commerce of its  trademark, well before any use by Applicant of its  logo. *See supra* Section IV(c)-(f). Thus, Opposer has standing for this opposition. *Hunt Control Systems Inc. v. Koninklijke Philips Electronics N.V.*, 98 U.S.P.Q.2d 1558, 1565 (TTAB 2011) (prior use established by testimony and conceded by applicant): *See also Research in Motion Ltd. v. Defining Presence Mktg. Group Inc.*, 102 U.S.P.Q.2d 1187, 1190 (TTAB 2012) (pleaded registrations of record established standing).

## **VI. OPPOSER HAS PRIORITY OF RIGHTS**

Opposer’s registered  trademark is senior to Applicant’s  logo. Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), provides that a mark shall be refused registration if it “so resembles a mark registered in the Patent and Trademark Office, or a mark...previously used in the United States by another and not abandoned...”. To establish priority, an opposer need only show rights arising from a prior registration or prior trademark or service mark use. *Research in Motion*, 102 U.S.P.Q.2d at 1191; TBMP 309.03(c)(A).

Opposer is the owner of two federally registered  trademarks, Registration Nos. 4480850 and 4609469. In each of these registrations, Opposer claims, and has set for the evidence of proof herein, a date of first use in interstate commerce in connection with the listed goods at least as early as August 1, 2008 and December 31, 2008. (Section IV(a) *supra*).

Opposer also uses the  trademark in association with its sale of gym equipment such as atlas stone molds, since at least as early as November 2010. (Orlando 64-67, 97-98, Exs. 11-15).

Opposer has offered undisputed evidence that Opposer has used, and continues to use the  trademarks throughout the United States. (Section IV(c) *supra*). In contrast, Applicant admitted that it began use in commerce of the  logo in the United States on April 9, 2012, well after Opposer's first use of the  trademark. Opposer's long time use of its  trademark establishes Opposer's priority of rights in this proceeding. *Mattel Inc. v. Funline Merch, Co.* 81 U.S.P.Q.2d 1372, 1373-74 (TTAB 2006); TBMP 309.03(c)(A).

## **VII. APPLICANT'S MARK CREATES A LIKELIHOOD OF CONFUSION**

Pursuant to Section 2(d) of the Lanham Act, registration is refused if the trademark “so resembles a mark registered in the Patent and Trademark Office, or a mark...previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive...” 15 U.S.C. § 1052(d). The Board’s “determination of likelihood of confusion is based upon [an] analysis of all the probative facts in evidence that are relevant to the factors bearing on this issue.” *Research in Motion*, 102 U.S.P.Q.2d at 1192. The test consists of thirteen factors, including (1) whether the goods or services are related or if the activities surrounding their marketing are such that confusion as to origin is likely; (2) whether the marks themselves are similar in appearance, sound, connotation and commercial impression; (3) the similarity or dissimilarity of consumers and established trade channels; (4) whether the purchase will most likely be made on an “impulse” or in a “careful, sophisticated” manner; (5) the number and nature of similar marks in use on similar goods; (6) the extent actual confusion; (7) the extent to

which applicant has a right to exclude others from use of its mark on its goods; and (8) any other established fact probative of the effect of use. *In re E.I. Du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). The Du Pont factors are not listed in the order of merit and each play a dominant role, depending on the case. *Id.* at 1361-62. However, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Ft. Howard Paper Co.*, 192 U.S.P.Q. 24 (C.C.P.A.1976). In assessing whether a likelihood of confusion exists, all doubts are resolved in favor of the prior user. *Nina Ricci S.A.R.L. v. E.F.T. Enterprises, Inc.*, 12 U.S.P.Q.2d 1901, 1903-04 (Fed. Cir. 1989); *Hancock v. American Steel & Wire Co.*, 97 U.S.P.Q. 330, 333 (C.C.P.A. 1953).

Opposer maintains that under this standard, Applicant's  logo creates a likelihood of confusion with Opposer's  trademark.

A. Opposer's  Trademark is Strong and Warrants Broad Protection

The fifth *duPont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection. *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 160, 117 U.S.P.Q. 295, 296 (CCPA 1958). “[T]here is “no excuse for even approaching the well-known trademark of a competitor ... and that all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially when the established mark is one which is famous.” *Kenner Parker Toys v. Rose Art Industries, Inc.*, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992); and *Nina Ricci S.A.R.L. v. E.T.F. Enterprises, Inc.*, 889 F.2d 1070, 2 U.S.P.Q.2d 1901, 1904 (Fed. Cir. 1989). This is so because “a well-known mark enjoys an appropriately wider latitude of legal protection, for similar marks tend to be more readily confused with a mark that is already known to the public.”

*Opryland USA, Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 U.S.P.Q.2d 1471, 1474 (Fed. Cir. 1992).

Opposer's  trademark, is a very strong, bold, distinctive mark. Prior to Applicant's first use in commerce of its  logo, and to Opposer's knowledge, there were no other marks similar to Opposer's in the marketplace and Applicant has not introduced any evidence to the contrary (Saran 74:17-23); (Orlando 157:16-158:11); (Martinez 90:2-91:17). The two marks at issue are both representations of the letter "H," however, the confusion lies in the nature and stylized design of the Hs as well as in what each H represents, i.e. "Hybrid Athletics" versus "Hylete," a.k.a. "Hybrid Athlete." (Sections IV(c) and (e) *supra*). This is not simply a matter of if there are other "H" marks in the general marketplace. Applicant has attempted to cite other H marks, such as the "H" representing the "Hurley" brand. (Orlando 157:16-158:11); (Wilson 168:9-11; 169:17-19) However, each of those cited marks have completely different designs and represent completely different meanings, i.e. "Hurley" does not mean "Hybrid Athlete," "Under Armor" is not even an "H" – it's a design of an "A" and a "U." *See In re Klien*, 2014 WL 2159241, \*3 (TTAB 2014) (the other marks "have other arbitrary matter that creates, for each mark, totally different connotations and overall commercial impressions from Applicant's and Registrant's substantially identical marks.>"). Applicant's testimony is irrelevant to the matter at hand - these marks are nothing similar to the  or  marks and have different commercial impressions.

The  trademark is very well-known and famous within the world of health and fitness, especially within the arena of CrossFit, in which millions of people world-wide participate. (Section IV(b) *supra*). Opposer [REDACTED], marketing, promoting, offering for sale and selling goods and services branded with the  trademark.

Opposer has sold its branded  trademark clothing and gym equipment all over the U.S., to consumers in every state, and throughout the world. Mr. Orlando has traveled to hundreds of gyms, fitness competitions, and training seminars marketing his brand as a star athlete, a gym owner, and in his capacity as a CrossFit Strongman seminar instructor. Mr. Orlando was a top competitive athlete early in his career, which assisted in quickly creating the basis of his well-known brand, along with his heavy online marketing.

Opposer has heavily marketed its brand and  trademark, receiving millions of views, through social media, has posted and/or has been featured in hundreds of personal and sponsored videos on personal YouTube channels, Instagram, Facebook, and Twitter, and through other social media owned, hosted and officially sponsored by CrossFit.

Mr. Orlando, also while wearing clothing bearing the  trademark, has appeared on commercials featured at the CrossFit Games and on Fox News. Mr. Orlando is also a monthly columnist for a wildly popular, widely recognized magazine, Muscle & Fitness, with millions of viewers per month, in which he promotes the  trademark in his articles. Since 2008, Opposer has worked hard, day in and day out, tirelessly, living his passion and without fail, promoting the  trademark and brand. One can truly say a lot of blood, sweat and tears have gone into building the iconic  trademark.

As Mr. Saran stated, *supra* Section IV(c), “[I]f somebody said they didn’t know who Rob Orlando is and they were in the CrossFit Community, I’d wonder if they’d been in prison or on a deserted island.” Mr. Orlando is a “well-regarded, well-known person. He’s a fixture in the [CrossFit] community.” (Saran 44:8-17).

Millions of fans and consumers have had access to and have viewed Opposer's marketing and promotions. Fans come from far and wide to Opposer's gym in Stamford, Connecticut just to workout with Mr. Orlando and to take a picture in front of the wall with the  trademark. Through Opposer's collection of extensive sales and promotion, Mr. Orlando's achievements as an athlete and his successes as a fitness trainer, all under the capacity of representing the  trademark, this mark is widely known, strong and famous, and therefore warrants broad protection. This factor which plays a large role in the likelihood of confusion analysis, supports a finding that Applicant's mark creates a likelihood of confusion.

B. Opposer's Mark And Applicant's Mark Are Strikingly Similar And Have the Same Commercial Impression

In evaluating the similarity of the  trademark and  logo, the Board must determine whether the marks are "sufficiently similar that confusion as to the source of the goods and/or services offered under the respective marks is likely to result." *Research in Motion*, 102 U.S.P.Q.2d at 1193. The proper analysis is not whether the marks are distinguishable in a side-by-side comparison, "but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of memory over a period of time." *Sealed Air Corp. v. Scott Paper Co.*, 190 U.S.P.Q. 106, 108 (TTAB 1975) (citations omitted). "[T]he emphasis must be on the recollection of the average purchaser who normally retains a general rather than a specific impress of trademarks" *Id.*, and thereby whether the marks are sufficiently similar in terms of their commercial impression? such that persons who encounter the marks would be likely to assume a connection between the parties." *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 U.S.P.Q.2d 1713, 1721 (Fed. Cir. 2012), *citing Leading Jewelers Guild v. JLOW Holdings, LLC*, 82 U.S.P.Q.2d 1901, 1905 (TTAB 2007).

The parties' marks are strikingly similar representations of the letter "H" in both sight and sound. If one traces the outside frames of the two bold designs they are virtually identical. If one places one H design directly on top of the other, they cover each other almost perfectly. Both "H" designs have a shield like appearance and have their widest portion of the letter about a quarter of the way down from the top. Both "H" marks also get progressively narrower towards the top and bottom of the marks. Now put these two design logos on shorts and t-shirts and have consumers view them while they are on an athlete - consumers will see bold H designs that appear as the same shape.

Furthermore, the marks have the same commercial impression. Opposer's H design represents the first letter of "Hybrid Athletics." Applicant's H design represents the first letter of "Hylete" which is a combination of the two words "hybrid athlete." (Wilson 88:11-18).

Accordingly, the  trademark and  logo are not distinguishable based on their commercial meanings and has added to the confusion in the marketplace. (Sections IV(c)-(g) *supra*); (Martinez 73:23-75:8). "[I]t is well established that similarity in any one of the elements of sound, appearance, or meaning is sufficient to indicate likelihood of confusion" *Gen. Food Corp. v. Wisconsin Bottling, Inc.*, 190 U.S.P.Q. 43, 45 (TTAB 1976).

It is not a coincidence, nor is it necessary, that Applicant uses a stylized "H" design for its trademark, nor is it a coincidence that the "H" design is so similarly constructed to Opposer's. It is clear that the creators of Applicant's H design knew the strength and popularity of Opposer's brand and H mark long before Hylete was formed. (Section IV(d) *supra*); (Paulson 14:19-24)

Overall, the significant similarities between marks far outweigh the slight differences. Indeed, the marks are so very similar and this critical factor weighs heavily in favor of a finding of likelihood of confusion.

C. Applicant's Clothing Goods Are Identical To Opposer's Clothing Goods And Related to Opposer's Gym Services And Equipment

As described *supra* in Sections IV(c)-(g), the goods at issue are identical, which lessens the degree of similarity between the marks needed to find a likelihood of confusion than if there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 U.S.P.Q.2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 U.S.P.Q.2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 U.S.P.Q.2d 1323, 1325 (TTAB 2007).

The fundamental question when considering this DuPont factor is whether the goods and services at issues can be related in the mind of the consuming public as to their origin. *Recot, Inc. v. M.C. Becton*, 54 U.S.P.Q.2d 1894, 1897 (Fed. Cir. 2000). If the respective parties' goods are so related that the consumer believes that the marks indicate that the goods emanate from a single source, then that supports a finding of likelihood of confusion. *See Research in Motion*, 102 U.S.P.Q.2d at 1194. "It is not necessary that these respective goods be identical or even competitive in order to support a finding of likelihood of confusion." *Time Warner Entm't Co. v. Jones*, 65 U.S.P.Q.2d 1650, 1661 (T.T.A.B. 2002). "It is sufficient that the respective goods...are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source." *Weider Publications, LLC v. D & D Beauty Care*

*Company, LLC*, 109 U.S.P.Q.2d 1347, 1356 (TTAB 2014). The goods at issue are identical as well as highly related to Opposer’s services.

Opposer and Applicant both sell, t-shirts, hoodies, shorts, tank tops and other clothing accessories. The services listed in Opposer’s first  trademark registration are “Conducting fitness classes; Health club services, namely, providing instruction and equipment in the field of physical exercise; Personal fitness training services and consultancy; Physical fitness instruction” and the goods listed in Opposer’s second  trademark registration are “Bottoms; Headwear; Tops.” As detailed *supra*, in Section IV(c), Opposer has used the  trademark in U.S. commerce since 2008 and sells several different articles of clothing and accessories, gym equipment and fitness services. These goods and services are sold online through Opposer’s websites, through the Rogue Fitness website, at seminars, fitness events and at the Hybrid Athletics gym. *See* Section IV(c) *supra*. Opposer’s goods and services are sold to individuals who are interested in fitness training, competitive athletes, and those who are just looking to better their health through exercise. Opposer sells its goods and services to those interested in CrossFit and Strongman, as well as to those in a more general fitness category. *See Id.* Applicant sells the same clothing goods to the same consumers through the same marketing channels.

Opposer’s and Applicant’s fitness clothing are identical goods and Opposer’s gym equipment and gym services are highly related to Applicant’s fitness clothing. (Sections IV(c)-(g) *supra*); (Martinez 24:22-25:11, 27:5-28:18); (Leydon 13:4-14:12). “It is well recognized that confusion is likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other.” TMEP. § 1207.01 citing, e.g., *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 6 U.S.P.Q.2d 1025 (Fed. Cir. 1988) (likelihood of confusion found between “BIGG’S (stylized)” for retail grocery and general merchandise store services and

“BIGGS and design” for furniture); *In re H.J. Seiler Co.*, 289 F.2d 674, 129 U.S.P.Q. 347 (C.C.P.A. 1961) (likelihood of confusion found between SEILER for catering services and SEILER'S for smoked and cured meats); *In re Phillips-Van Heusen Corp.*, 228 U.S.P.Q. 949 (TTAB 1986) (likelihood of confusion found between 21 CLUB for various items of men's, boys', girls' and women's clothing and THE “21” CLUB (stylized) for restaurant services and towels). The goods listed in Applicant's application are “Athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps.” “I would think pretty much every gym sells clothing.” (Leydon 13:24-25).

In addition, Applicant and Opposer market their respective goods to the same consumers. IV(c) & (f). Before Applicant, the relevant consumers were used to seeing the  trademark as the only other “H” to truly represent CrossFit culture, nothing else was like it. (Orlando 157:16-158:11); (Saran 74:17-23). Therefore, the same consumers that see Applicant's  logo in connection with Applicant's goods mistakenly think that Applicant's goods originate from Opposer, that Applicant is an extension of the Hybrid Athletics brand, or that Applicant is in some way associated with Opposer.

A likelihood of confusion is more readily found when goods and services are competitive and the marks are very similar. *Schering Corporation v. Savage Labs., Inc.*, 129 U.S.P.Q. 239, \*1 (TTAB 1961) (“Considering therefore the over-all similarity between these marks, together with the fact that they are applied to competitive products, it is concluded that there is at least a reasonable likelihood of confusion or mistake or deception of purchasers.”) Also, as mentioned above, if the goods or services of the respective parties are closely related, the degree of similarity between the marks required to support a finding of a likelihood of confusion is not as great as would apply with more diverse goods and services. *Century 21 Real Estate Corp.*, 970

F.2d at 877. *In re Dixie Restaurants*, 105 F.3d 1405, 41 U.S.P.Q.2d 1531, 1534 (Fed. Cir. 1997), quoting, *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 U.S.P.Q.2d 1698, 1700 (Fed. Cir. 1992). Therefore, marks do not need to be identical to be confusingly similar. *In re Gail Rosen/Steve Rosen*, 2002 WL 257375 (TTAB 2002); *see also Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 U.S.P.Q.2d 1813, 1816-17 (Fed. Cir. 1987) (Marks “Commcash” and “Communicash” not identical but strikingly similar).

Applicant’s goods are identical to Opposer’s goods and highly related to Opposer’s services. Applicant and Opposer market their goods to the same consumers using strikingly similar marks. When a consumer sees these marks on goods that are identical, competitive, or substantially similar and/or related, there is bound to be confusion (as described detail supra Section IV(c), (f) & (g); *see Orlando Ex. 2 ¶¶18, 43*). This critical factor also weighs heavily in favor of finding that Applicant’s mark creates a likelihood of confusion.

D. Applicant’s Goods And Opposer’s Goods Travel In Identical Trade Channels

Neither Opposer’s registrations nor Applicant’s application contain any limit as to the channels of trade and classes of purchasers in the specification of goods. Thus, all normal and usual channels of trade and methods of distribution are to be considered. *L’Oreal S.A. v. Marcon*, 102 U.S.P.Q.2d 1434, 1441 (TTAB 2012); *See also e.g., In re Thor Tech, Inc.*, 90 U.S.P.Q.2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”)

Opposer and Applicant are not only involved in the world of physical fitness and the sale of related apparel, they also market to a more defined consumer based, those who CrossFit. (*Orlando Ex. 2 ¶¶6, 19*); *see also* (Section IV(f) *supra*) This type of physical fitness is a world

sensation and very different from traditional methods of working out. (Orlando Ex 2 ¶3); *see also* (Section IV(b) *supra*). While, Opposer's and Applicant's apparel are available for purchase to a wide consumer base of people who exercise in general, they are also sought after by those who participate in CrossFit training.

Opposer and Applicant both market and sell their goods online via their respective websites, through gyms, social media and at the same sport competitions and events. (Orlando Ex. 2 ¶¶33-39); *see* (Sections IV(c), (e) & (f) *supra*).

The channels of trade are further shown to be identical due to the fact that Applicant approached Opposer in April 2012 and inquired whether Opposer wanted to promote the Hylete brand and thereby, market their respective goods together. (Section IV(d) *supra*). On April 23, 2014 and April 27, 2014, Applicant sent Opposer sets of "Mock-ups" of apparel using Hybrid Athletics'  trademark next to Hylete's  indicating that it strongly wanted to promote its goods in the same fitness field of Hybrid Athletics' and the  trademark. (Orlando Ex. 2 ¶43, 32; *see also* (Section IV(d) *supra*).

Applicant has even stated that it has many of the same purchasers. (Wilson 60:21-23, 61:6-10 & 18-25, 100:9-12, 115:3-10); (Paulson 47:3-9). Therefore, because the class of purchasers for Applicant's goods is identical to the class of purchasers for Opposer's goods and services, it is presumed that Applicant and Opposer sell their goods through the same channels of trade. *See L'Oreal*, 102 U.S.P.Q.2d at 1441. Applicant has shown that these channels are the same. (Section IV(f) *supra*).

This factor also weighs heavily in favor of a finding that Applicant's mark creates a likelihood of confusion.

E. Consumer's Often Purchase Applicant's And Opposer's Goods On Impulse

Applicant's goods and Opposer's goods which are identical thereto are relatively inexpensive and normally clothing goods, such as athletic t-shirts and shorts are more subject to an impulse purchase. *See e.g. In re Picture Entertainment Corp.*, 2009 WL 1741919, \*2 (TTAB 2009); *In re MTTM Worldwide, LLC*, 2010 WL 1920474, \*3, \*6 (TTAB 2010). These goods are made by ordinary consumers with nothing more than ordinary care.

As indicated above, some of the largest sales of athletic apparel are made at events, such as the CrossFit Regionals or the CrossFit Games. There are numerous vendors at these events and, as at any sports event, there are large crowds and a lot of commotion. Purchasers want to feel like they are a part of the CrossFit Community so many purchases are made, often in the excitement of the event. *See Section IV(c)(2)*<sup>3</sup>. Fans want to purchase clothing from vendors that are well-known or iconic, such as Opposer. (Section IV(g) *supra*)(Mr. Orlando and Mr. Jengten testifying to consumers pointing the Hylete "H" and excitedly saying they supported Opposer's brand). Therefore, not only are the prices of goods relatively inexpensive, but the conditions around which they are purchased are also subject to impulse and not made with great care. *See e.g. Anheuser-Busch, LLC v. Innvopak Systems Pty Ltd.*, 115 U.S.P.Q.2d 1816, \*13 (TTAB 2015) (explaining that if the goods are those that are subject to impulse purchase, it is more likely that a "hurried consumer would assume a connection between the source of such products sold under similar trademarks.") Same as in *Anheuser-Busch*, it is very reasonable to believe that consumers at such events are excited and hurried to make their purchases in all the commotion and as not miss the CrossFit competitions taking place.

The same goes for online purchases. Opposer usually sees a spike in clothing sales after his CrossFit Strongman seminars. Fans want to purchase Opposer's items, so they go online

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<sup>3</sup> CrossFit events are one of the largest selling weekends of vendors' year. Mr. Orlando also testified that his training seminars also create spikes in clothing sales.

after a training and buy some gear. Yet, as shown *supra*, IV(c) & (g), *e.g.* Miki Carey’s confusion, fans are confused. Even if these fans knew of Opposer for years and were very familiar with the fitness industry, or even CrossFit or Strongman in particular, “being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks,” *In re Decombe*, 9 U.S.P.Q.2d 1812, 1814-1815 (TTAB 1988). Where marks are very similar and goods related, confusion may be likely even among sophisticated purchases. *In re Wilson*, 57 U.S.P.Q.2d 1863, 1865-66 (TTAB 2001).

This factor also weighs heavily in favor of a finding that Applicant’s mark creates a likelihood of confusion.

F. There Are Numerous Instances Of Actual Confusion

Proof of actual confusion is not necessary to show a likelihood of confusion, however, where evidence of actual confusion is presented, this factor is normally very persuasive of a finding of likelihood of confusion and weighs heavily in favor of Opposer. *See e.g. Edom Laboratories, Inc. v. Glenn Lichter*, 102 U.S.P.Q.2d 1546, 2012 WL 1267961 (TTAB 2012) (precedential; sustaining opposition); *Pose Lock Puller, Inc. v. Swenco Products, Inc.*, 2001 WL 1345042, \*4 (TTAB 2001)(not precedential); *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 208 U.S.P.Q. 384, 389 (5th Cir. 1980) (“The best evidence of likelihood of confusion is provided by evidence of actual confusion”).

Opposer has experienced and submitted multiple instances of consumer confusion from a wide range of sources. (Section IV(g) *supra*). Opposer has provided evidence from ordinary CrossFit consumers to those within the CrossFit trade who are expected to be more knowledgeable about the source of the products in their industry, such as vendors, gym owners,

CrossFit executives, CrossFit in-house counsel, and the Deputy Editor of Muscle & Fitness. Opposer has also set forth evidence that actual confusion has led to numerous purchases of Applicant's goods instead of Opposer's. (Section IV(g) & (h) *supra*).

When Applicant brought its goods to market and started to sell its apparel, confusion was practically instantaneous and Applicant was aware of the likeness between the marks - quoting Mr. Paulson, "I won't lie... we had a few people say it looks like [Opposer's] logo." Mr. Paulson's statement was in response to Opposer's initial concern that the marks were eerily similar. (Orlando 109:4-15, 121:15-122:11, Ex 32-34, 37); *see also* (Paulson 45:2-3)

This factor therefore weighs heavily in favor of a finding that Applicant's mark creates a likelihood of confusion.

G. Opposer Has The Right To Exclude Others From Using Confusingly Similar Marks

Opposer owns U.S. Registration Nos. 4480850 and 4609469 for the  trademark, registered on February 11, 2014 and September 23, 2014, respectively. Pursuant to 15 U.S.C. § 1115, a federal registration "shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce."

Opposer not only owns these registrations, but has proved through its submission of an abundance of evidence, that has used the  trademark in U.S. commerce since as early as 2008 for clothing apparel and its fitness services and 2010 on its fitness equipment. (Section IV(c) *supra*). Therefore, based on Opposer's use and registration of the  trademark, Opposer has the right to exclude Applicant from using or registering a mark that would likely cause confusion, or to cause mistake, or to deceive. *See* 15 U.S.C. §§1052(d), 1114.

This factor also weighs in favor of a finding that Applicant's mark creates a likelihood of confusion.

H. Conclusion: Applicant's Mark Will Create A Likelihood Of Confusion

Since 2008, the  trademark has been used extensively and continuously on and in ongoing nationwide promotion of Hybrid Athletics, the CrossFit Strongman Trainer Courses, apparel and fitness equipment. The factors weigh heavily in favor of a finding that Applicant's  logo will create a likelihood of confusion with Opposer's  trademark. Opposer's mark is strong, well-known, if not famous to the relevant consuming public, and warrants broad protection based on Opposer's use of the mark for over eight years. The  trademark and  logo are strikingly similar, if not virtually identical in sight and they have the same commercial meaning. Applicant's goods are also identical and highly-related to Opposer's goods and services, and both parties market their goods and services to the same fitness consumers who use the goods at the same gyms and competitions. Lastly, Applicant's goods travel in the same trade channels as Opposer's goods and services.

Based on the above, the Board should sustain Opposer's opposition and reject the application.

**VIII. APPLICANT'S MARK HAS AND WILL CONTINUE TO CAUSE DAMAGE TO OPPOSER**

Although Opposer need not prove damages to support its opposition (*see Blackhorse v. Pro Football, Inc.*, 98 U.S.P.Q.1d 1633, 1638 (TTAB 2011); TBMP 309.03(b)), Opposer has been and will continue to be damaged by Applicant's use and registration of a confusingly similar mark. Opposer has seen a decline in sales revenue of t-shirts and apparel in direct correlation with Hylete's creation and marketing around 2014 and taking into account the

increasing instances of consumer confusion. Sections IV(c), (d), (g) & (h) supra. Opposer as referenced above that it experiences frequent comments from consumers thinking that they have supported Opposer, when in actuality they have purchased Applicant's goods. Sections IV(g) & (h) supra. In 2015, [REDACTED]. *Id.*

Mr. Orlando has expressed his concern with the presence of Hylete and the  logo, "If they can do this to my apparel business, if they decide to start getting into the equipment business...where they start making stone molds and start slapping their H inside some stone molds, [REDACTED]." (Orlando 127:3-129:6) Opposer believes that Hylete has greatly caused harm to Opposer by misleading consumers to purchase Hylete's products as opposed to Hybrid Athletics'. (Jengtgen 97:18-100:6). Hylete's advertising and social media posts, such as on Facebook targeted to CrossFit and Strongman communities, also greatly harm Opposer by diverting business to Hylete and away from Opposer. (Jengtgen 97:18-100:6). A large portion of Opposer's success stems from the sale of its apparel and equipment. It must be able to differentiate itself in the marketplace and keep competitors from using confusingly similar marks.

Applicant has not sought authorization from Opposer to use the  trademark, or mark confusingly and substantially similar thereto with Applicant's goods. In fact, when Opposer objected to Applicant's use, Applicant continued to move forward, market, promote, distribute and sell goods under the  logo. (Sections IV(d)-(h) supra). Applicant's continuing use and application for registration of a virtually identical mark in connection with identical goods has and will continue to create confusion and erode the value of Opposer's  trademark.

**IX. CONCLUSION**

Opposer has established standing to oppose the application, and that Opposer has priority of rights. Applicant is attempting to register a mark that will likely cause consumer confusion with Opposer's strong trademark. Accordingly, Opposer has been damaged by Applicant's use of the  logo and will be further so by the registration of such mark.

For all of these reasons, Opposer respectfully requests that the Board sustain this proceeding and refuse registration of the applicant for Applicant's  logo.

HYBRID ATHLETICS, LLC

March 22, 2016

/s/ Michael J. Kosma

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*ATTORNEYS FOR OPPOSER*

# Appendix A

REDACTED

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

<b>HYBRID ATHLETICS, LLC,</b>	:	
	:	
<b>Opposer,</b>	:	<b>Opposition No. 91213057</b>
	:	<b>Serial No.</b>
<b>v.</b>	:	<b>Trademark: Hylete "H" Logo</b>
	:	
<b>HYLETE LLC,</b>	:	
	:	
<b>Applicant.</b>	:	

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**STATEMENT OF OBJECTIONS TO HYTELE'S TESTIMONY EVIDENCE, IN PART**

Opposer, Hybrid Athletics, LLC, hereby moves the Board to strike certain testimony and exhibits contained in Applicant's Testimony Depositions of Abbe Guddal, James Wardlow, Ron Wilson, Garret Potter, Jennifer Null, and Matt Paulson in the above referenced Opposition. Applicant has proffered materials not produced during discovery, that are in violation of the Board's November 18, 2014 Sanction Order, among numerous other violations of evidence production, which makes the introduction of Applicant's evidence inappropriate during Applicant's Testimony period. In support of its objections, Opposer states as follows:

Opposer filed a Notice of Opposition on or about October 16, 2013. On October 18, 2013, the Board issued an order setting the discovery and testimony periods. On May 21, 2014, Opposer filed a motion to compel discovery, setting forth as Exhibits A and B therein, Opposer Hybrid Athletics' First Set of Interrogatories to Applicant and Opposer Hybrid Athletics' First Set of Requests for the Production of Documents and Things to Applicant, respectively. (TTABVue #8). In said motion, Opposer explained its good faith efforts in which it had attempted to obtain discovery from Applicant, but to no avail. On July 4, 2014, the Board granted Opposer's motion to compel and gave Applicant thirty (30) days in which to complete

the “responses to Opposer’s document requests and interrogatories (served on March 4, 2014)” and also stated should “applicant fail to provide the ordered responses and initial disclosures, then Opposer’s remedy will lie in a motion for sanctions in the form of entry of judgment sustaining the oppositions and refusing registration.” (TTABVue #10). On August 13, 2014, due to Applicant’s failure to comply with the Board’s July 4, 2014 Order, Opposer filed a Motion for Sanctions requesting that the Board sustain the opposition and refuse registration of Trademark application Ser. No. 85837045. (TTABVue #11).

On November 18, 2014, the Board issued an order sanctioning Applicant for not participating in discovery. (TTABVue #15). Therein, the Board Ordered that Applicant was estopped from submitting at trial or relying on as evidence at trial, “any information or documents that were the subject of Opposer’s discovery requests, but which were not served on Opposer prior to the filing of Opposer’s motion for sanctions.” *Id.* The Board also reminded Applicant that should it discover any new information or materials that were responsive to Opposer’s previously served discovery, Applicant should promptly supplement its responses.

Applicant never supplemented its discovery document production, yet, during Applicant’s Testimony depositions, a majority of the testimony and evidence submitted by Applicant was, and is, within the scope of the documents requested by Opposer, but not produced by Applicant as part of discovery. Therefore, such testimony and exhibits, are in violation of the Board’s Sanction Order and may not be relied upon by the Applicant.

In particular, Applicant withheld from Opposer interrogatory responses and document production that go straight to the heart of this proceeding, including, the geographic scope of Applicant’s use, evidence of continuous use of the Applicant’s mark, sales figures, advertising, advertising expenditures, targeted consumers, identification of manufacturers of Applicant’s line

**REDACTED**

of goods, any contractual relationships or distribution agreements Applicant has with its customers and/or other third parties, survey evidence, documents exchanged between Opposer and Applicant, as well as any Exhibits Hylete was planning to rely on and offer at trial. (TTABVue #8, Exs. A & B, Interrogatories 1-21 and Document Requests 1-26).

Therefore, based upon the Board's Sanction Order and Applicant's complete failure to produce in response to Opposer's specific written discovery or to otherwise disclose such documents, Opposer hereby objects to all of the testimony offered by Ron Wilson, James Wardlow, Garret Potter, Matthew Paulson, Jennifer Null, and Abbe Guddal and the exhibits which are founded upon such undisclosed documents. Opposer also objects to various portions of Applicant's testimony and exhibits as they are inadmissible hearsay pursuant to Fed. R. Evid. 802, irrelevant pursuant to Fed. R. Evid. 402, lacked materiality pursuant to Fed. R. Evid. 403, and lacked foundation or personal knowledge pursuant to Fed. R. Evid. 602.

Opposer hereby repeats all of its objections as stated at the time of Applicant's Testimony depositions and specifically listed in the below chart. Opposer requests that all testimony by Applicant relating to or based upon the undisclosed discovery and all exhibits that are in any way related thereto, as well as evidence that is inadmissible due to it being hearsay, irrelevant, immaterial, and lacking foundation, be stricken from the record herein.

**REDACTED**

Objections to Abbe Guddal's October 27, 2015 Testimony & Exhibits (TTABVue#34)

Exhibit	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections									
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous
A	Hylete's Customer Service Manager (CRM) and the testimony connected therewith.	8:17-15:11	X	Doc Request: 19	X	X	X	X				
B	List of examples of Hylete customer feedback and the testimony connected therewith.	15:15-25:19	X	Doc Request: 19; Interrog: 15	X	X	X	X	X			Document made for the purpose of litigation; Not a business record.
	Testimony connected with Ex C, a black and white photocopy of the Opposer's and Hylete's logos.	25:23-27:8				X	X					
D	Four logos: Under Armor, Opposer's, Hylete's and Hurley and the testimony connected therewith..	27:13-30:8	X	Doc Request: 19	X	X	X	X				

REDACTED

Objections to James Wardlow's October 27, 2015 Testimony & Exhibits (TTABVue#35)

Exhibit(s)	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections									
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous
B	Color photocopy of screenshot of Hylete's website page and the testimony connected therewith	13:19-16:6	X	Doc Request: 4, 5, 7, 8, 12, 19, 21, 24; Interrog: 10	X	X	X	X	X			
C-D	Screenshots of Hylete's social media pages (Facebook and Instagram respectively) and testimony connected therewith.	16:7-24:23	X	Doc Request: 2, 5, 7, 8, 9, 12, 19, 21; Interrog: 10	X	X		X	X	X		
E	Portion of Ian Jentgen's Testimony Deposition and the testimony connected therewith.	24:24-27:22						X	X	X		
F	Hybrid Athletics website and the testimony connected therewith.	27:23-28:16	X	Doc Request: 19	X	X	X	X		X		Opinion not given by an expert
G	Comparison of web traffic from similarweb.com between Opposer's and Hylete's websites and the testimony connected therewith.	28:20-30:16	X	Doc Request: 19	X	X	X	X	X	X		Lacks authentication
H & I	Google Trends screenshots and the testimony connected therewith.	30:20-32:15; 32:19-33:14	X	Doc Request: 19	X	X	X	X	X	X		
	Testimony connected with Ex J, a black and white photocopy of the Opposer's and Hylete's logos.	34:2-35:20				X	X					
K	Four logos: Under Armor, Opposer's, Hylete's and Hurley and the testimony connected therewith.	35:24-36:20	X	Doc Request: 19	X	X	X					
L-M	Exit survey presented to consumers after a purchase from hylete.com and the testimony connected therewith.	37:4-42:24	X	Doc Request: 4, 7, 8, 10, 12, 14, 19, 21, 24, 26; Interrog: 15	X	X	X					

Objections to Ron Wilson's October 29, 2015 Testimony & Exhibits (TTABVue#37)

Exhibit	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections										
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous	
2--12	US Patents for Apparatus and Method for Making an ear warmer and ear warmer frame, eyeglasses, and hand covering and the testimony connected therewith.	21:19-36:9	X	Doc Requests: 19	X	X	X	X	X				
13	Jaco Vida LLC webpage and the testimony connected therewith	36:14-52:15	X	Doc Requests: 19	X	X	X	X	X	X			
14-17 & 23	US Patents for shorts, waistband, lower-body garment, and undergarment with protective cup and the testimony connected therewith.	52:19-86:16; 102:19-110:4.	X	Doc Requests: 19	X	X	X						
	Testimony surrounding the start up of Hylete.	86:17-90:13				X	X						
18	Testimony connected to Ex 18 regarding the application for registration of the Hylete Trademark.	90:14-91:17		Doc Requests: 19	X	X							
19-20	Picture of drawings of Hylete icons and Wikipedia Search for Eurostile type font and the testimony connected therewith	91:21-98:19	X	Doc Requests: 1, 2, 19; Interrog: 8	X								Additionally, Ex 19 is incomplete. Wilson testified that he drafted "hundreds and hundreds of pages" but only two pages with seven Hylete "H" sketches were submitted.
21	Under Armor font and the testimony connected therewith.	98:23-100:24	X	Doc Requests: 19	X	X	X	X	X	X			
22	Batman logos and the testimony connected therewith.	101:3-102:15	X	Doc Requests: 19	X	X	X	X					
24	Men's Health, the best fitness gear internet search and the testimony connected therewith.	110:11-111:8	X	Doc Requests: 4, 5, 7, 8, 11, 12, 19, 21, 24; Interrog: 10, 14	X	X	X						
25	Hylete Facebook page and the testimony connected therewith.	111:12-112:9	X	Doc Requests: 2, 5, 7, 8, 9, 12, 19, 21; Interrog: 10	X								
26-29	Board.crossfit.com webpages, blog from Wodville, reviews of co-branded Hylete Onnit Cross-Training shorts 2.0 and the testimony connected therewith.	112:13-117:23	X	Doc Requests: 4, 5, 7, 8, 11, 12, 19, 21, 24; Interrog: 10, 14	X	X	X						

Objections to Ron Wilson's October 29, 2015 Testimony & Exhibits (TTABVue#37)

Exhibit	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections										
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous	
	Testimony connected to Ex 30 regarding pages 101 through 111 of Ian Jentgen's deposition transcript.	120:11-130:2							X	X	X	X	Misstatement of the evidence - the line of thinking within the portion of the transcript was not complete. The full details of Mr. Jentgen's line of testimony was not read in Mr. Wilson's testimony. After page 111, Mr. Jentgen clearly goes on to say that the relevant consumers were pointing to the logo on the shorts
31-36	Way back Machine webpage of hybridathletics.net, YouTube videos of Robert Orlando, Picture of Robert Orlando, Screenshot of Instagram image of Robert Orlando on the cover of Muscle & Performance Magazine the testimony connected therewith.	130:6-135:24	X	Doc Requests: 19	X	X	X		X	X	X		
	Testimony connected to Ex 37 regarding page 69 of Sincere Martinez' deposition transcript.	136:2-138:20								X	X		
38-49	<ul style="list-style-type: none"> <li>• Hybrid Athlete Web Page</li> <li>• Hybrid Athlete Web Page</li> <li>• Rogue Web page</li> <li>• Hybrid Athletic Performance Facebook page</li> <li>• Hybrid Athletic Performance webpage</li> <li>• Hybrid Athletics Facebook page</li> <li>• Hybrid Athletics, Ltd. Facebook page</li> <li>• Hybrid Athletics Community Facebook page</li> <li>• Hybrid Athletic Club Facebook page</li> <li>• Athletic Hybrid Fitness Facebook page</li> <li>• Hybrid Athletics Facebook page</li> <li>• Copy/image of the Hybrid Athlete Book and the testimony connected therewith.</li> </ul>	139:1-148:16	X	Doc Requests: 19	X	X		X	X	X	X		
50	Rogue Fitness web page and the testimony connected therewith.	148:20-149:19	X	Doc Requests: 19	X				X		X	X	
	Testimony connected to Ex 51, Wilson comparing the Hybrid and Hylete H logos.	149:23-154:20					X				X		
52-53	Hybrid Athletics Apparel Webpages and the testimony connected therewith.	154:24- 156:10	X	Doc Requests: 19	X				X	X			Lack of Authentication
54	Hylete.com screenshot and the testimony connected therewith.	156:14 - 157:3	X	Doc Requests: 1, 2, 4, 5, 7, 8, 9, 12, 19, 21, 24	X						X		
55	Hybrid Athletics Facebook page and the testimony connected therewith.	157:7-20	X	Doc Requests: 19	X	X							
56	Hylete Athletics Facebook page and the testimony connected therewith.	157:24 - 158:17	X	Doc Requests: 2, 5, 7, 8, 9, 12, 19, 21; Interrog: 10	X							X	Lacks Authentication

REDACTED

Objections to Ron Wilson's October 29, 2015 Testimony & Exhibits (TTABVue#37)

Exhibit	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections										
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous	
57	Picture of Hammerhead Kettle bell and the testimony connected therewith.	158:21-159:12	X	Doc Requests: 19	X								
	Testimony regarding Hybrid's and Mr. Orlando's intellectual property rights.	160:13-161:10							X	X	X	Assumption of Facts	
	Testimony connected to Ex 59 regarding pages 12 and pages 40-41 of Dave Castro's deposition transcript.	161:14-164:11								X	X		
60	Google image search for H on apparel and the testimony connected therewith.	164:15-168:3	X	Doc Requests: 19	X	X				X	X		
61	Four logos: Under Armor, Opposer's, Hylete's and Hurley and the testimony connected therewith.	168:7-170:25	X	Doc Requests: 19	X	X	X						

REDACTED

**Objections to Garret Potter's October 29, 2015 Testimony & Exhibits (TTABVue#38)**

<b>Exhibit</b>	<b>Exhibit/Testimony Description</b>	<b>Testimony Citations (Page:Line(s))</b>	<b>Objections</b>								
			<b>Violates Sanction Order (TTABVue #15)</b>	<b>Relevant Doc Requests and Interrogatories to Sanction Order</b>	<b>Not Produced During Discovery</b>	<b>Irrelevant</b>	<b>Immaterial</b>	<b>Hearsay</b>	<b>Lacks Foundation</b>	<b>Speculation</b>	<b>Lacks Personal Knowledge</b>
	Testimony presented regarding legal advice obtained by Hylete regarding this opposition proceeding and connection to investor relations.	12:7-23; 14:15-15:5			X	X	X	X	X	X	
	Testimony presented regarding Hylete's revenue and money spent on enforcement of the Hylete mark.	13:17-14:14; 15:7-16:5				X			X	X	X

Objections to Jennifer Null's October 28, 2015 Testimony & Exhibits (TTABVue#39)

Exhibit	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections									
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous
	Testimony connected to Ex 2, Null comparing the Hybrid and Hylete H logos	39:24-42:5				X				X		
3-7	Documents regarding communications with Al Kavadlo, Becca Day, Robb Wolf, Chris Elmore and Danny Nichols and the testimony connected therewith.	42:7-52:5	X	Doc Requests: 14, 19	X	X			X	X	X	1) Prejudicial; 2) Violates the Original Document rule; 3) If Applicant meant these documents as a survey Opposer objects as they lack the basic required elements of an acceptable survey: a) Respondents were not selected from the proper universe, b) Respondents do not constitute a representative sample of that universe, c) Not accurate reporting, d) Data was not analyzed in accordance with accepted principles, e) Questions were leading, f) The questions were not asked by qualified persons using proper interviewing procedures. See e.g. McDonough Power Equip., Inc. v. Weed Easter, Inc., 208 U.S.P.Q. 676, 684-85 (TTAB 1980) (methods of operating the survey raised issues of partiality).
8	Screenshot of Robert Orlando CrossFit videos and the testimony connected therewith.	52:6-54:13	X	Doc Requests: 19	X	X			X	X	X	X
9	Image of an atlas stone that says Hammerhead Fitness and the testimony connected therewith.	54:14-55:23	X	Doc Requests: 19	X	X			X	X	X	
10-12	Images of advertisements from a company called Hyperwear and the testimony connected therewith.	55:24-58:2	X	Doc Requests: 19	X	X			X	X	X	
13	Four logos: Under Armor, Opposer's, Hylete's and Hurley and the testimony connected therewith.	58:4- 61:14	X	Doc Requests: 19	X	X	X	X	X	X	X	

REDACTED

Objections to Matt Paulson's October 28, 2015 Testimony & Exhibits (TTABVue#40)

Exhibit	Exhibit/Testimony Description	Testimony Citations (Page:Line(s))	Objections									
			Violates Sanction Order (TTABVue #15)	Relevant Doc Requests and Interrogatories to Sanction Order	Not Produced During Discovery	Irrelevant	Immaterial	Hearsay	Lacks Foundation	Speculation	Lacks Personal Knowledge	Miscellaneous
2	Term sheet between JACO Athletics and Robert Orlando and Hybrid Athletics and the testimony connected therewith.	18:1-24:4	X	Doc Requests: 19	X	X		X		X	X	
	Testimony connected to Ex 3 regarding pages 99-101 of Robert Orlando's deposition transcript.	24:5-28:2				X	X	X			X	
4	Document regarding Hylete commission program and the testimony connected therewith.	34:6-37:6	X	Doc Requests: 2, 5, 7, 8, 9, 11, 12, 19, 21, 23, 25, 26	X	X						
5-7	Mock-ups for Josh Henkin, Chad Waterbury and Nick Tuminello with co-branded merchandise and the testimony connected therewith.	37:7-41:11	X	Doc Requests: 2, 5, 7, 8, 9, 11, 12, 19, 21, 23, 25, 26	X	X						
9-10	Emails to and from Matt Paulson from Jason Ackerman and the email attachment dated May 5, 2013 and the testimony connected therewith.	47:10-51:6	X	Doc Requests: 19	X	X	X	X				
11	Hylete vendor contract with CrossFit of a booth at 2013 Regionals and CrossFit Games and the testimony connected therewith.	52:1-53:4	X	Doc Requests: 19	X	X						
	Testimony connected to Ex 12 regarding pages 68 of Dale Saran's deposition transcript.	53:5-55:11				X		X	X			Ex 12 was introduced as a partial document with no name of the Deponent's name
	Testimony connected to Ex 13 comparing the Hybrid and Hylete logos.	55:12-57:3				X						
14-17	Document regarding communications with Drew Manning, Mike Fantigrassi, BJ Gaddour, and Andy McDermott and the testimony connected therewith.	59:10-71:10; 73:3-9	X	Doc Requests: 14, 19	X	X	X	X	X			1) Prejudicial; 2) Violates the Original Document rule; 3) If Applicant meant these documents as a survey Opposer objects as they lack the basic required elements of an acceptable survey: a) Respondents were not selected from the proper universe, b) Respondents do not constitute a representative sample of that universe, c) Not accurate reporting, d) Data was not analyzed in accordance with accepted principles, e) Questions were leading, f) The questions were not asked by qualified persons using proper interviewing procedures. See e.g. McDonough Power Equip., Inc. v. Weed Easter, Inc., 208 U.S.P.Q. 676, 684-85 (TTAB 1980) (methods of operating the survey raised issued of partiality).
18	Four logos: Under Armor, Opposer's, Hylete's and Hurley and the testimony connected therewith.	71:19-72:24	X	Doc Requests: 19	X	X	X					

**CERTIFICATE OF SERVICE**

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

Kyriacos Tsircou  
Tsircou Law, P.C.  
515 S. Flower Street, Floor 36  
Los Angeles, CA 90071-2221

March 22, 2016  
Date

/s/ Joan M. Burnett  
Joan M. Burnett