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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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**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>v.</b>	:	<b>Trademark: Hylete “H” Logo</b>
	:	
<b>HYLETE LLC,</b>	:	
	:	
<b>Applicant.</b>	:	

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

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Opposer, Hybrid Athletics, LLC (“Opposer” or “Hybrid”), by and through its counsel Whitmyer IP Group, hereby submits its Reply Brief 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**

Despite the Board sanctioning Hylete for not complying with its discovery obligations, Hylete still failed to supplement its discovery. Not only did Hylete fail to supplement its discovery responses, Hylete did not even bother to provide its purported “evidence” it attempts to now rely on until during its Testimony Period.<sup>1</sup> Hylete’s owner, Ron Wilson, testified that he only took it upon himself to gather Hylete’s “evidence” two to three weeks prior to Hylete’s Testimony Period. (Wilson 164:19-23; 166:12-15) (“...in the last few weeks, I’ve had to dedicate all my free time to familiarizing myself with this case and formulating our response.”). Hylete’s failure to participate during discovery, despite numerous Orders to do so, is deplorable. Hylete should not be allowed to benefit from its inexcusable conduct, especially after being sanctioned by the Board. Hylete’s last ditch effort is unacceptable, as a majority of its documents and testimony, as indicated in Hybrid’s Appendix A to its Trial Brief, was requested in Hybrid’s document requests and interrogatories. Hylete’s actions have severely hindered these proceedings and multiplied Hybrid’s costs by necessitating multiple motions to compel and

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<sup>1</sup> As outlined in Hybrid’s Appendix A to its Trial Brief, the majority of documents Hylete attempted to introduce for the first time during its Trial Period are not evidence under the Federal Rules and not admissible in view of the TTAB’s Sanction Order.

objections to Hylete's plethora of inadmissible documents and testimony presented. Hylete's conduct throughout these proceedings is inexcusable.

Furthermore, regardless of Hylete's inadmissible evidence, Hylete's Trial Brief barely cites to any of its evidence nor do the arguments it presented rely on such evidence.

Furthermore, Hylete has incorrectly included arguments against certain points and and/or arguments in Hybrid's Trial Brief in its objections section. Not only are Hylete's arguments incorrect, they should have been made in its main brief, and therefore should be ignored.

Hylete's brief is perplexing and willfully blind to the entire picture painted by Hybrid's abundance of strong evidence. Hylete's brief only attempts to address a small portion of Hybrid's evidence. Hybrid has more than established that not only a likelihood of confusion exists, but actual confusion exists. Hylete's brief has not provided any factual evidence to dispute such facts. Hylete's arguments are nonsensical, irrelevant and/or rely on inadmissible evidence.

In summary, Hybrid is dealing with an Applicant that knew Hybrid's logo long before Hylete's was created. Hybrid, for the last eight years, built its company and branded its distinctive, well-known mark through multiple media outlets and resources, including through Mr. Orlando's successes as a star athlete, column writer for a national, famous magazine, YouTube and CrossFit.com internet sensation, CrossFit expert trainer who travels the world and to a multitude of gyms, gym owner, and ecommerce retailer. Yet Hylete, with no evidence besides opinion testimony from its own employees, claims Hybrid, Mr. Orlando, and the  logo are no longer relevant in the fitness and CrossFit community. Hylete's evidence is entirely biased and, quite frankly, defies common sense.

It is absurd to believe that Mr. Ron Wilson, the creator of the  logo, did not see Hybrid's  logo while managing Jaco. Mr. Wilson has an overarching control over each aspect of every business he has owned and operated. Mr. Wilson personally runs Hylete, (Wilson 166:5-11), and Hylete is a much bigger business than Jaco. How could Mr. Wilson be less involved at Jaco, a smaller company he personally started? Jaco, during much of the time it sponsored Mr. Orlando, had five (5) employees, (Wilson 75:15-22), including Mr. Wilson. Mr. Wilson worked extremely close with Matt Paulson, who worked with Mr. Orlando to print Hybrid's  logo on the Jaco shorts. Mr. Wilson and Mr. Paulson are personal friends and started Hylete together. Mr. Wilson knew of Mr. Orlando and had to have known what Hybrid's  logo looked like. It is impossible to believe that each person working at Jaco, in extremely close quarters, were not aware of Hybrid's  logo. Even Ms. Null, upon later joining Jaco, knew all about Mr. Orlando and Hybrid Athletics before working for Jaco and was a big fan. It is simply unbelievable that Mr. Wilson did not see Hybrid's  logo or hear the name "Hybrid Athletics" in reference to Hybrid while at Jaco.

It is well-known that marks do not have to be identical to cause a likelihood of confusion. Marks need only be similar enough to create a commercial impression that results in consumers likely believing that the goods emanate from the same source. *See* 15 U.S.C. 1052(d) ("...a mark which so resembles a mark registered in the Patent and Trademark Office..."). This is a case of similar marks on identical goods and marketed to the same consumers, which are not only likely to cause confusion, but have caused actual confusion in the marketplace.

## II. HYLETE'S MARK CREATES A LIKELIHOOD OF CONFUSION

### A. Hybrid Has Made Large Investments In Its Brand And The Logo Is Well-Known

Hylete repeatedly alleges that “Opposer has demonstrated an unwillingness to dedicate effort and resources to its apparel business...Opposer operates a low-cost, generic ‘out of the box’ ecommerce site and does not expend any resources on social media.” (Hylete’s Trial Brief, p. 10.) Not only are these statements false, Hylete points to no evidence *except* that of its own employees to discuss Hybrid’s business. As outlined in its opening brief, Hybrid expends large amounts of money and, more importantly, time promoting its business, apparel and equipment. Mr. Orlando repeatedly testified how important apparel sales were to Hybrid’s business. (Orlando 54:17-21; 144:2-20; 158:12-160:5, Exs. 58-63; 161:6-162:5).

Hylete also attempts to cast a negative light on Hybrid’s social media. While Hybrid agrees that social media is *one* area of marketing, it does not reverse the strength of a trademark if a company does not invest \$100K in promoting itself on social media. However, Hybrid not only markets itself on social media, such as Facebook and Instagram, but regularly posts videos to YouTube and is promoted on CrossFit.com. Furthermore, Hybrid’s services as an expert trainer for CrossFit are also advertised on CrossFit’s website and Mr. Orlando continuously travels to gyms and venues around the world promoting and selling items bearing the  logo. Mr. Orlando also advertises his brand on a monthly basis through his CrossFit column that he writes for Muscle & Fitness magazine that has a readership of eight (8) million independent views per month. Also, Hybrid is a fully functioning CrossFit gym and from the time of the Parties’ testimony periods until now, Hybrid has opened a second Hybrid Athletics gym in Bridgeport, CT. Thus, for Hylete to demean *one* aspect of Hybrid’s *many* efforts to market its

brand in order to make the statement that Hybrid has an “unwillingness to dedicate effort and resources” to its brand, is absurd.

While Hylete brags about the resources it has expended into its website and social media campaign, such activities cannot buy Hylete senior rights to Hybrid’s  logo and brand. It is and will always remain the junior user. That Hylete has allegedly poured large amounts of money into its website and other online platforms, attempting to flood the market with its  logo over Hybrid’s, only incurs further liability onto Hylete for damaging Hybrid’s brand. Such infiltration of the market has and will continue to cause serious damage to Hybrid, even to the point where reverse confusion is highly probable. *In re Melvin Calhoun, Jr.* 2012 WL 1708018, \*3 (TTAB 2012) (citing *In re Shell Oil Co.*, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993)) (“...trademark law...also protects the registrant and senior user from adverse commercial impact due to use of a similar mark by a newcomer.”)

B. The Similarities Between Hybrid’s And Hylete’s Marks Are Likely To Cause Consumer Confusion

Anyone can look at a design and describe it differently. Hylete can describe its  logo as - “light,” “airy,” “weapon-like” - however, it is not the description that matters, but what mark actually looks like and whether it is confusingly similar to Hybrid’s  logo. As stated in Hybrid’s Trial Brief, it is well-known that the test for likelihood of confusion is not a side-by-side comparison. The test for likelihood of confusion is the overall impression of the marks and how consumers will remember them when they are not next to each other, especially “when allowance is made for the fallibility of a consumer’s memory with regard to the minor differences between,” the marks. *In re Calzificio FAP S.P.A.*, 2003 WL 21291030, \*3 (TTAB 2003). Consumers, “retain general impressions of marks and cannot be presumed to have the

luxury of” comparing applicant’s mark and registrant’s mark side-by-side. *See In re I.F.R.A. Srl*, 2005 WL 1822532, \* 2 (TTAB 2005).

Both Hylete’s and Hybrid’s “H” logos are thick and bold. Both have the same exterior shape - the top third of the mark points and slants upward towards the center, the thickest point of each mark is a third of the way down from the top, and then from there, they both gradually slant downward and inward towards the bottom center. These marks are placed on the same goods, on the same locations of those goods, e.g. in the center of the chest on a t-shirt or on the bottom front panel of shorts. They are both the letter “H.” Hylete has explained that its mark is the letter “H” throughout its testimony, within its trademark application, and on the very first page of its “Introduction” section in its Trial Brief. (Hylete’s Trial Brief, p. 4)(“When the Board performs its analysis, it will find two distinct letter “H” marks...). Hylete uses its  logo many times next to the word “HYLETE,” not to demonstrate the marks independence, as Hylete tries to argue, but to draw an absolute connection between its  logo symbolizing the first letter of “HYLETE.” Hylete now attempts to argue that its mark is so stylized that it could be interpreted as many different things. However, that is not the case here. Hylete has not introduced any valid evidence to the contrary. The fact that Hylete has not used its  logo where the letter “H” should be, has no bearing on this analysis.

Hylete, also incredibly argues that Hybrid’s  logo is not even stylized and somehow, the fact that Hybrid has used its  logo to replace an “H” within *one* acronym on *one* of its multiple shirt designs (many others bear the  logo alone) thereby makes Hybrid’s mark incapable of being distinctive or a source identifier.

Both Hybrid's and Hylete's marks are stylized and therefore, the stylized designs and their similarities of appearance are controlling. See *Textron Inc. v. Maquinas Agricolas "Jacto" S.A.*, 215 USPQ 162, \*1 (TTAB 1982). Because of the similarities between the marks, and their practically identical commercial meanings, as well as the fact they appear on identical goods (in identical locations on those goods), those familiar with Hybrid's goods marketed under the  logo assume, upon encountering Hylete's goods bearing the  logo, that they also emanate from Hybrid. See *Hurst Performance Inc. v. Henderson*, 199 USPQ 48, \*9 (TTAB 1978). More importantly, Hybrid has provided an abundance of pinpoint evidence in its Trial Brief to support such a finding.

C. Hylete's Introduction Of Third Party "H" Registrations Are Irrelevant And Should Be Stricken From The Record

Hylete attempts to introduce evidence of 135 third party trademark registrations, allegedly all containing a stylized letter "H." Hylete, without any supporting testimony, attempts to claim that due to third party registrations, Hybrid's  logo is not strong, distinctive or capable of acting as a source identifier. This argument fails for numerous reasons, including the utter lack of evidence and that Hylete completely ignores Hybrid's evidence of actual confusion between the marks. Hybrid respectfully requests the Board to stricken from Hylete's Trial Brief, and thereby not consider, Hylete's entire Section D, "The Crowded Field of Letter Marks And The Lack of Actual Confusion Between Applicant's Stylized Logo and Opposer's Letter Mark" in "Section IV. Statement of Facts," and Applicant's entire Section C, "Opposer's Letter Mark is Not Strong Or Well Known" in "Section V. Arguments." Hylete has based its arguments and statements within these sections on supposedly 135 third party registrations, evidence that Hylete never even attempted to introduce in either a Notice of Reliance or during its Testimony Period.

Therefore, this evidence, and in turn these sections, should not be considered.

Hybrid also points to Hylete's argument that "a party solely relying on evidence of sale and advertising figures to establish that a mark is famous must place such sales figures in context of sales figures of other competing companies." (Hylete's Trial Brief, p. 18.) Hybrid, first and foremost, is not relying solely on its sales and advertising figures to establish its  logo is famous. This is just another instance where Hylete attempts to attack *one* detail of many and completely ignores the totality of the evidence presented by Hybrid. Hybrid's  logo has become well-known through various factors. As a quick recap, Hybrid's  logo is well-known and famous because 1) Mr. Orlando, starting in 2008, became an internet sensation through video postings on YouTube and CrossFit.com (wearing the  apparel and by working out in front of the large  logo wall in his videos), 2) Mr. Orlando was a strong competitor and star athlete from 2009-2011 in CrossFit and Strongman events and competitions, wearing  branded clothing while competing, 3) Mr. Orlando is the owner of the Hybrid Athletics gym (now two locations), a destination for CrossFitters, which prominently display the  logo and sells clothing and equipment branded with the  logo, 4) Mr. Orlando was the "King of CrossFit" in Muscle & Fitness magazine and the subject of at least two additional Muscle & Fitness articles, all while wearing clothing branded with the  logo and representing Hybrid Athletics (readership of Muscle & Fitness at the time of these articles was seven (7) million a month), 5) Mr. Orlando is now a column writer for Muscle & Fitness, where the  is represented and displayed (now the magazine has readership of eight (8) million a month), 6) Mr. Orlando is a Subject Matter Expert for CrossFit and travels around the world to hundreds of

gyms, selling his merchandise bearing the  logo, and finally 7) Hybrid has sold its goods bearing the  logo to customers in almost every zip code of the United States and Hybrid's gym equipment, such as atlas stone's bearing the  logo alone, can be found in a majority of CrossFit gyms in the United States. While Hylete attempts to contain Hybrid's  logo recognition solely to the sale of clothing, this is wrong. One cannot gauge the strength of Hybrid's  logo based solely on its use on clothing. Hybrid's  logo is branded on its clothing, clothing accessories, gym equipment, and fitness services.

The conceptual strength of Hybrid's  logo is extremely strong and very capable of denoting source of origin and Hybrid has submitted ample pinpoint evidence of such throughout its Trial Brief.

#### D. Hylete's And Hybrid's Goods Are Relatively Inexpensive

Hylete contends that its t-shirts, priced at \$35, are expensive relative to other fitness industry apparel and states the price of an Under Armor brand t-shirt retails for \$25. Hylete provides no evidentiary proof of this statement. Hylete attempts to reason that a price differential of \$10 dollars puts a product in another tier of goods and implies that consumers take more care in purchasing Hylete's products because of the \$35 cost. However, a \$10 price differential will simply not prevent consumers of athletic apparel from buying a shirt made by a brand that they either like to wear or want to support.

Not only did Hylete not submit any evidence verifying the accuracy of Under Armor's purported \$25 t-shirt, Hylete only mentions *one* example of *one* t-shirt model type from *one* brand. In response to Hylete's cost comparison, Hybrid visited the websites [nike.com](http://nike.com) and [reebok.com](http://reebok.com). Both of these companies sell athletic apparel competitive to Hybrid and Hylete.

Nike sells fitness t-shirts, such as running and training shirts, in a range from \$50 to \$125 (on average). See [http://store.nike.com/us/en\\_us/pw/mens-clothing/1mdZ7pu](http://store.nike.com/us/en_us/pw/mens-clothing/1mdZ7pu). Reebok, a licensed seller of CrossFit apparel, (Saran 19:18-24; 20:6-11) sells its training t-shirts between \$25 and \$65 (on average). See <http://www.reebok.com/us/men-tshirts-tops-apparel?start=48>. Based on these prices, Hylete's and Hybrid's goods are actually on the lower end of the athletic apparel cost spectrum. A reasonable mind would understand that customers of athletic apparel expect to see these prices and therefore will not put great concern in such purchases.

While the above evidence regarding Nike and Reebok were not previously submitted, this shows that this is yet another example where Hylete has attempted to claim something as fact, without any supporting evidence.

E. Hybrid's And Hylete's Goods Travel In The Same Channels Of Trade

Mr. Wilson testified that Hylete is "investing heavily in the future. We certainly believe in the CrossFit movement, the CrossFit community, and we stake a big claim to make sure that we're part of this functional fitness movement." (Wilson Dep. 165:18-23). Hylete's and Hybrid's goods are identical, are marketed to identical consumers and, thus, flow in the same channels of trade. While Hylete has been banned from all officially sponsored CrossFit events due to its mark being confusingly similar to Hybrid's, that has not prevented Hylete from participating in non-official fitness competitions or other fitness events where both Hybrid and Hylete may both appear. It also does not make a difference that both Hybrid and Hylete run separate e-commerce websites. If a consumer is confused as to Hylete being affiliated or associated with Hybrid, they will go to Hylete's website and make a purchase.

F. Hybrid's Evidence Of Actual Confusion Is Strong Evidence That There Is A Likelihood Of Confusion

In finding a likelihood of confusion, there does not need to be any evidence of actual confusion. *See Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990); *In re ICS Systems, Inc.*, 2012 WL 893478, \*5 (TTAB 2012). However, "[a] showing of actual confusion [is] of course be highly probative, if not conclusive, of a high likelihood of confusion." *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1317, 65 U.S.P.Q.2d 1201 (Fed. Cir. 2003); *Molenaar, Inc. v. Happy Toys Inc.*, 188 U.S.P.Q. 469, 1975 WL 20853 (TTAB. 1975) (even a single instance of confusion is at least "illustrative of how and why confusion is likely"); *Morningside Group Ltd. v. Morningside Capital Group, L.L.C.*, 182 F.3d 133, 141, 51 U.S.P.Q.2d 1183 (2d Cir. 1999) ("Evidence that confusion has actually occurred is of course convincing evidence that confusion is likely to occur.").

All Hylete's witnesses are its employees, and each have testified that they purportedly never received any comments or concerns from customers that Hylete was related to or affiliated with Hybrid. Yet, Hybrid offered into evidence at least four instances where Hylete was aware of actual confusion: (1) Jennifer Null testified, corroborating Mr. Castro's testimony, that Mr. Castro was confused as to whether Hylete was Hybrid's brand (Castro 38:11-24; 39:1-25; 40:3-23); (Null 38:15-39:6), (2) & (3) two different postings on Hylete's social media pages (Wardlow Exs. N and O), and (4) Paulson's admission that people said Hylete's  logo was confusing with Hybrid's  logo (Orlando 121:4-122:18, Ex. 37).

More importantly, because Hylete refused to participate in discovery, which resulted in sanctions by the Board, it should be assumed that many more instances of actual confusion exist that Hylete has not admitted to or produced. Regardless, the fact that Hylete's employees and their self-serving testimony did "not know" of any instances of actual confusion is not probative

to there being actual instances of confusion or to the finding of a likelihood of confusion. *In re Bissett-Berman Corp.*, 476 F.2d 640, 642 (CCPA 1973). Given the fact that Hybrid has submitted numerous instances of written confusion, as well as Hybrid's witnesses testifying they were personally confused and/or to having hundreds of verbal conversations with confused consumers, there is ample evidence to show that confusion is not only likely, but actually exists.

Hylete also incorrectly argues that Hybrid cannot prove likelihood of confusion without proof that someone mistakenly bought Hylete's merchandise under the impression it was Hybrid's goods. Not only is this standard wrong in the analysis of a likelihood of confusion, but Hybrid did provide actual examples of lost sales, e.g. that from Miki Carey (Orlando 132:20-133:15, Ex. 40) and the many individuals who approached Mr. Orlando and Mr. Jentgen pointing to the Hylete logo to show they were supporting Hybrid Athletics. (Orlando 123:2-125:25, 141:12-142:18); (Jentgen 102:24-104:5). Each individual indicating support of Hybrid Athletics while pointing to the Hylete  is not only confusion, but a lost sale.

Finally, Hylete attempts to disparage Hybrid's witnesses as being biased because they are or were "friends" and "colleagues" of Mr. Orlando. However, while Mr. Orlando has known many of Hybrid's witnesses through professional and working relationships, some of these witnesses know more about the CrossFit and fitness industry than most individuals and thus their actual confusion is of an even worse degree than that of the ordinary consumer. For example, Mr. Tuthill, editor and chief of Muscle & Fitness magazine, may want to pay his columnists on time, but such a desire does not make him best friends with his magazine contributors, it's just good business sense. And Mr. Martinez and Mr. Orlando were once friends, but such friendship severed years ago, and when asked why Mr. Martinez agreed to be deposed, he stated because "it's just right, the right thing." (Martinez 83:15-16.) Same goes for Mr. Leydon who has respect

for Mr. Orlando as a colleague and a competitive athletic, and he and his wife were both confused when they saw Hylete's logo for the first time. Finally, Mr. Saran, CrossFit's legal counsel, and Mr. Castro, the CrossFit Games Director, are highly knowledgeable about the CrossFit industry and the brands that represent it.

Importantly, not one of Hybrid's above third-party witnesses have a personal stake in the outcome of this proceeding. Each of Hybrid's witnesses are hard working professionals with busy schedules who were selected to testify because of the actual confusion they each experienced, their credibility and superior knowledge within the fitness industry. However, on the other hand, all of Hylete's witnesses are its employees who have a personal stake in the outcome of this proceeding.

### III. CONCLUSION

Once more, Hylete is attempting to register a mark that has already and will likely cause consumer confusion with Hybrid's strong  logo. Hybrid has been damaged, and will continue to be damaged by Hylete's use of the  logo and will be further so by the registration of such mark. Hybrid respectfully requests that the Board sustain this proceeding and refuse registration of the application for Hylete's  logo.

May 11, 2016

HYBRID ATHLETICS, LLC

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# Appendix A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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<b>HYBRID ATHLETICS, LLC,</b>	:	
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<b>Opposer,</b>	:	<b>Opposition No. 91213057</b>
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<b>v.</b>	:	<b>Trademark: Hylete “H” Logo</b>
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<b>Applicant.</b>	:	

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**Hybrid’s Reply to Hylete’s Response to Hybrid’s Statement of Objections to Hylete’s  
Testimony Evidence**

Throughout Hylete’s Response to Hybrid’s Objections to Hylete’s Testimony, it is clear that Hylete is attempting to argue the merits of this case through an appendix to its Trial Brief. Arguing the merits in this manner is improper and such arguments belong in Hylete’s Trial Brief. As argued within Hybrid’s Reply Trial Brief, Hylete has barely cited to any of its purported evidence. Yet, within Hylete’s appendix, Hylete alleges the importance of the evidence it attempted to introduce during its Trial Period. Due to the improper placement of these arguments, they should be summarily disregarded and any testimony and/or exhibits Hylete has not cited should not be introduced into evidence and should be stricken from the record.

Throughout Hylete’s Response to Hybrid’s Objections, despite Hylete’s failure to cooperate during discovery and the Board’s discovery Sanction Order, Hylete alleges that its production of documents and testimony, produced for the first time during its trial depositions, is proper for various reasons. Hylete’s most common justifications for its late production of documents is that “Applicant did not believe such documents and testimony would be important to its case until after Opposer presented its Trial Testimony.” However, if Hylete had

participated in discovery, Hylete would have produced these documents as they had been requested by Hybrid. It is undeniable that Hylete knew this case concerns the likelihood of confusion between Hybrid's and Hylete's logos. Therefore, any evidence introduced by Hylete, which was subject to Hybrid's discovery requests and concerning confusion or lack thereof, should have been disclosed during discovery. However, as explained in Hybrid's Reply Brief, not only did Hylete fail to supplement its discovery responses, Hylete did not even bother to provide its purported "evidence" until during its Testimony Period. Hylete's owner, Ron Wilson, testified that he only took it upon himself to gather Hylete's "evidence" two to three weeks prior to Hylete's Testimony Period. (Wilson 164:19-23; 166:12-15) ("...in the last few weeks, I've had to dedicate all my free time to familiarizing myself with this case and formulating our response."). Hylete failed to collect and produce documents it intended to rely upon during its case until its own testimony period. Such actions has severely prejudiced Hybrid as Hybrid did not have an opportunity to review the documents in order to prepare its case. Moreover, Hylete only chose to produce the choice documents it selected to support its case, and not a single document that showed actual confusion, despite it being undeniable that such documents exist as outlined in Hybrid's Reply Brief. Hylete should not be allowed to benefit from its failure to participate in discovery, especially after already being sanctioned by the Board.

Hylete also justifies its late disclosure of evidence:

- To establish the "effort that Applicant has dedicated to establishing itself as... an apparel company."

- “To establish the lack of resources that Opposer dedicates to operating its apparel company which Applicant believes is the reason for Opposer’s decline in sales, not as the result of any customer confusion with Applicant’s mark.”
- “There is no surprise to Opposer...” given that such evidence under this justification include images of Hylete’s website, Hybrid’s website and “publicly available information.”

However, these attempted justifications do not outweigh the severe prejudice Hybrid has suffered due to Hylete’s late disclosure of this evidence. Hybrid cannot be expected to guess Hylete’s strategy, defenses, or evidence. Just because information is publically available on the internet 1) does not make it accurate or 2) shift the burden to Hybrid to be knowledgeable of all such information. Hybrid cannot guess what evidence Hylete will attempt to rely on to support its case.

Hylete did not disclose the objected to documents a month, week, day, or even an hour before Hylete’s Testimony period. Hybrid was given all of the objected to documents for the first time when Hylete’s counsel handed it to Hybrid’s counsel during Hylete’s Trial depositions. Hylete’s conduct is inexcusable and has severley prejudiced Hybrid, after Hybrid had already expended much money and time preparing for and going through its entire testimony period to then be ambushed with Hylete’s undisclosed documents and testimony. The Federal Rules of Civil Procedure and TTAB proceedings are designed to prevent a trial by ambush and Hylete should not be allowed to flout the rules and procedures in place. The goal of discovery is to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent.” *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st

Cir. 1992) (*quoting United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958)). This was a trial by surprise and highly prejudicial to Hybrid.

Additionally, as stated within the Hybrid's Reply Trial Brief, any evidence that Hylete has attempted to introduce allegedly showing the strength of its own mark is not relevant in this matter, as Hylete will always be the junior user of a confusingly similar mark to Hybrid's  logo. All evidence of purported large investments in Hylete's mark only goes to prove further harm to Hybrid. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) ("The avoidance of confusion between users of disparate size is not a new concept; however, the weighing of the relevant factors must take into account the confusion that may flow from extensive promotion of a similar or identical mark by a junior user.")

Additionally, Hylete's attempt to introduce evidence to "prove" Hybrid's decline in apparel sales is due to its "lack of effort and resources" dedicated to selling Hybrid's apparel and not because of consumer confusion is obviously prejudicial to Hybrid for various reasons. This evidence, should have and could have been disclosed at discovery. Hybrid was robbed of the opportunity to introduce testimony or documents countering Hylete's theory. The production of practically all of Hylete's documents in its Testimony period is highly unfair and prejudicial to Hybrid as it spent a large amount of time and effort preparing for its case prior to and during its Testimony period.

Hylete's remaining responses to Hybrid's objections are without merit and most of its purported evidence is irrelevant. Hylete, as Hybrid explained in its Reply Brief, continuously attempts to misdirect the Board by focusing on small irrelevant points. For example, Hylete has attempted to introduce purported evidence of web traffic to Hylete's website compared to Hybrid's website. Not only is the web traffic unsubstantiated, web traffic is not the entire picture

of the strength or relevance of Hybrid's  logo. As discussed in Hybrid's Reply Brief, Hybrid sells its goods, including apparel, through many different internet platforms and physical venues and therefore purported web traffic to Hybrid's website alone is irrelevant.

Hybrid also addresses exhibits 3-7 in Ms. Null's Deposition (Null 42:7-52:5) and exhibits 14-17 in Mr. Paulson's Deposition (59:10-71:10; 73:3-9). Hybrid maintains its objections to these exhibits and they should be disregarded. These documents clearly fall under multiple interrogatories and document requests within Hybrid's discovery and these documents could have clearly been available to Hylete during discovery. Hylete not only failed to produce these documents according to the Sanction Order, these documents do not establish a lack of consumer confusion and are not admissible under the federal rules of civil procedure. These documents are clearly hearsay, do not fall into any of the hearsay exceptions, and violate the best evidence rule. Moreover, the individuals named thereon are not established experts, the documents lack foundation, the questions presented on the documents are leading and biased, the presenters of the questions were not a neutral party or a survey expert. Thus, these exhibits and the testimony surrounding them should not be admitted into evidence.

Hybrid also addresses exhibits L-M in Mr. Wardlow's Deposition. The purported "exit survey" from Hylete's website should be disregarded. This document clearly falls under multiple interrogatories and document requests within Hybrid's discovery and was available to Hylete during discovery. This document is also irrelevant in proving a likelihood of confusion, or lack thereof, between Hybrid and Hylete's H logos. The questions of the survey are geared towards assisting Hylete with internal and public marketing strategies. Answers to the questions on the exit survey are provided to the consumers in a multiple choice manner. There is nothing in the survey that would prompt a consumer to state anything about Hybrid. More importantly, a

confused customer would not know they were not buying from Hybrid if they were confused. Therefore, the lack of commentary regarding a connection to Hybrid has no significant meaning. Thus, these exhibits and any testimony relating thereto should also be excluded.

### **CONCLUSION**

Whatever evidence Hylete thinks outweighs the prejudice bestowed upon Hybrid due to its violation of the discovery Sanction Order, it does not. Hybrid respectfully requests that the Board sustain all of Hybrid's objections set forth in Appendix A of Hybrid's Trial Brief.

# Appendix B

**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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**Hybrid’s Reply to Hylete’s Statement of Objections to Opposer’s Testimony Evidence**

Hylete has moved to strike certain testimony and exhibits contained in Hybrid’s Testimony Depositions. As to any objections made during the Hybrid’s Testimony Depositions that are not specifically set forth within Hylete’s objection chart, Hybrid requests that the Board not consider such objections. Hylete’s broad language that it repeats all of its objections stated at the time of Hybrid’s Trial Depositions is not specific enough for the Board to consider them. *See Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741 (TTAB 2006)(a party must specify the documents and testimony objected to as “the Board will not cull through each deposition and exhibit in order to identify each separate objection.”).

Hylete, in certain instances has objected to statements made in Hybrid’s Trial Brief, but is not objecting to actual testimony or exhibit evidence. As shown below, examples of the statements Hylete has objected to include, but are not limited to, “The two marks at issue are both representations of the letter “H,” however, the confusion lies in the nature and stylized design of the H as well as in what each H represents, i.e. “Hybrid Athletics” versus “Hylete,” a.k.a. “Hybrid Athlete,” Trial Brief pg. 36, “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,” Trial Brief pg. 37, or “Millions of fans and consumers have had access to and have viewed Opposer’s marketing and promotions.” Trial Brief 38. While Hybrid has addressed each of these objections, the Board should not consider these objections because they are improperly placed in Hylete’s appendix. If Hylete disagreed with statements made in Hybrid’s trial brief, it should have properly argued and set forth its own evidence, against them in the body of its Trial Brief. But it did not.

As Hybrid demonstrates with specificity in the chart set forth below, all evidence upon which Hylete objects based upon hearsay are indeed admissible. Any testimony or emails regarding confusion “are admissible under the hearsay exceptions set forth under Fed. R. Evid. 803(1) (present sense impression), as evidence of what [the witness] experienced during the [conversation], or, under Fed. R. Evid. 803(3) (state of mind), as statements revealing the declarants' states of mind. The statements are not offered for the truth of the statements but rather simply for the fact that they were made.” *Nanny Poppins, LLC*, 2013 WL 3188900, at \*7 (T.T.A.B. May 16, 2013)(citing *Toys “R” Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) (out-of-court statements admissible to show “that people have, in fact, made an association” between the parties); *Finance Company of America v. Bank-America Corp.*, 205 USPQ 1016, 1035 (TTAB 1979, as amended 1980) (employees’ testimony regarding receipt of misdirected mail or telephone calls not hearsay), *aff’d in unpub’d opinion, Appeal No. 80-558 (CCPA February 12, 1981)*; *Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155, 217 USPQ 145, 149 n.10 (5th Cir. 1982) (testimony of plaintiff’s employees regarding purchasers attempting to reach defendant admissible); *CCBN.com Inc. v. c-call.com Inc.*, 53 USPQ2d 1132, 1137 (D. Mass. 1999) (“Statements of customer confusion in the trademark context fall under the ‘state of mind exception’ to the hearsay rule”)).

As Hybrid further demonstrates with specificity in the chart set forth below, all evidence upon which Hylete objects based upon claims that the evidence is irrelevant, immaterial or lack foundation, are indeed admissible.

Each of Hybrid's witnesses have intimate knowledge of Mr. Orlando, the Hybrid Athletics Brand, CrossFit, the CrossFit community and the fitness community as a whole as each have worked as CrossFit trainers, own CrossFit affiliate gyms, work directly for CrossFit, have travelled to hundreds of affiliate CrossFit gyms, have participated/competed as CrossFit athletes and/or attended numerous CrossFit competitions.

- Dale Saran: Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. (Saran 67:2-15; 12:17-17:16; 18:14-21:16; 22:11-23:14; 24:14-28:1; 29:11-30:18). Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety. (Saran 38:18-39:2;41:22-43:3; 44:1-7; 60:13-62:20)
- David Castro: Mr. Castro has been highly involved in CrossFit as an athlete and employee since at least 2005. Mr. Castro has personal knowledge of CrossFit's popularity, consumers and market. Mr. Castro has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety. (Castro 7:9-17:6; 20:2-22:2; 25:9-28:4; 30:6-31:22)
- Robert Orlando: Mr. Orlando has been highly involved in CrossFit as an athlete and employee since at least 2008. Mr. Orlando has personal knowledge of CrossFit's popularity, consumers and market. Mr. Orlando also has personal knowledge of Hybrid's, his own company's, following and the brand's notoriety. (Orlando 6:20-7:7; 22:23-25:3; 30:3-31:7; 33:7-34:9; 42:4-46:7; 50:6-51:6; 52:6-20; 56:5-58:8; 64:14-18; 70:24-71:23; 90:22-94:12)
- Ian Jentgen: Mr. Jentgen has personal knowledge of Mr. Orlando and Hybrid's following and brand notoriety. (Jentgen 27:21-30:5; 30:21-32:3; 33:10-36:15; 36:20-37:14; 43:4-45:13; 53:25-54:8; 74:12-75:12; 84:22-86:3; 88:16-89:8)
- Jason Leydon: Mr. Leydon has been highly involved in CrossFit as an athlete and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety. (Leydon 5:16-22; 6:18-8:24; 9:25-13:25; 14:13-16:8; 17:10-18:16; 19:11-21:18)
- Mathew Tuthill: Mr. Tuthill is heavily involved in the fitness community as deputy editor of Muscle & Fitness. Mr. Tuthill has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety. (Tuthill 5:13-7:21; 8:4-25; 11:7-12:6; 13:2-14:23;

15:14-17:3; 19:9-13)

- Syncere Martinez: Mr. Martinez has been highly involved in CrossFit as a gym owner and seller of clothing. Mr. Martinez has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety. (Martinez 6:19-8:7; 13:7-23; 23:7-26:17; 28:19-30:14; 32:15-34:14; 35:14-20; 37:13-24; 41:19-42:3; 50:18-51:3; 51:11-53:10; 63:5-10)

Exhibit/Testimony Description	Trial Brief Citation	Objections					
		Irrelevant	Hearsay	Immaterial	Lacks Foundation	Lacks Personal Knowledge	Speculation
<p>"[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,"</p>	<p>Trial Brief: pg.9 Testimony: (Saran 46:9-12)</p>	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Opinion Testimony. Not an out of court statement made by a third-party.	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.		X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.
<p>"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."</p>	<p>Trial Brief: pg.10 Testimony: (Saran 77:16-79:8; Exs. 2, 4)</p>			X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.		X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.
<p>"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."</p>	<p>Trial Brief: pg.10 Testimony: (Orlando 5:17-18, Ex. 21); see also (Castro 15:10-17:6)</p>	X Relevant to CrossFit's popularity and large community. Relevant to the large amount of consumers and corporations competing for these consumers.			X Mr. Orlando and Mr. Castro have both been highly involved in CrossFit as athletes and employees since at least 2008 and 2005 respectively. Both witnesses have personal knowledge of CrossFit's popularity, consumers and market.	X Mr. Orlando and Mr. Castro have both been highly involved in CrossFit as athletes and employees since at least 2008 and 2005 respectively. Both witnesses have personal knowledge of CrossFit's popularity, consumers and market.	X Mr. Orlando and Mr. Castro have both been highly involved in CrossFit as athletes and employees since at least 2008 and 2005 respectively. Both witnesses have personal knowledge of CrossFit's popularity, consumers and market.

Exhibit/Testimony Description	Trial Brief Citation	Objections					
		Irrelevant	Hearsay	Immaterial	Lacks Foundation	Lacks Personal Knowledge	Speculation
Mr. Castro's opinion on how well-known Mr. Orlando's  trademark was between 2008 and 2012,	(Castro 34:8-21)				X Mr. Castro has been heavily involved in CrossFit since as early as 2003. Mr. Castro organized the first CrossFit games and is the Director of the CrossFit Games. Mr. Castro has personal knowledge of the notoriety of Hybrid Athletics' trademarks.	X Mr. Castro has been heavily involved in CrossFit since as early as 2003. Mr. Castro organized the first CrossFit games and is the Director of the CrossFit Games. Mr. Castro has personal knowledge of the notoriety of Hybrid Athletics' trademarks.	X Mr. Castro has been heavily involved in CrossFit since as early as 2003. Mr. Castro organized the first CrossFit games and is the Director of the CrossFit Games. Mr. Castro has personal knowledge of the notoriety of Hybrid Athletics' trademarks.
"These videos not only caught the attention of CrossFit Inc., but of many hundreds of thousands of people that viewed them worldwide."	Trial Brief: pg.13	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
(Orlando 74:20-75:16;Exs. 18, 19, 20, 21,23)(stating "...people recognize it and come tome 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...")	Testimony: (Orlando 74:20-75:16; Exs. 18,19, 20, 21, 23)	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.		X Mr. Orlando has personal knowledge of the statements made to him.		
Many of Mr. Orlando's videos started and/or ended with the  trademark.	Testimony: (Orlando 71:3-7)	X Relevant to Hybrid's marketing and fame.	X Not an out of court statement made by another. Furthermore, this is a fact Mr. Orlando has personal knowledge of and supported by exhibits.		X Mr. Orlando has personal knowledge of the videos he made and referred to numerous exhibits in his testimony.		

Exhibit/Testimony Description	Trial Brief Citation	Objections					
		Irrelevant	Hearsay	Immaterial	Lacks Foundation	Lacks Personal Knowledge	Speculation
The videos really helped Mr. Orlando build his personal following and as a result, his brand.	Testimony: (Orlando 82:14- 83:20; Exs. 18-23); (Jentgen 52:11-54:8)	X Relevant to Hybrid's marketing and fame.	X Not an out of court statement made by another. Furthermore, both Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's following and strong brand.		X Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's following and strong brand.		X Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's following and strong brand.
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.	Trial Brief: pg13	X Improper Objection fails to object to numerous cites to actual evidence.			X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
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.	Trail Brief: pg. 13  Testimony: (Orlando 72:4- 18, 150:12-156:11; Exs. 17-18; 55, 56) (Jentgen 33:21-34:15, 75:3-77:20)		X Consumer support is evidenced by sales and brand recognition. Any third-party statements are offered for the mere fact they were said. Furthermore, both Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's sales, following and strong brand.	X Relevant to the notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's consumer support, sales, following and strong brand.	X Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's consumer support, sales, following and strong brand.	X Mr. Orlando and Mr. Jentgen have personal knowledge of Mr. Orlando and Hybrid's consumer support, sales, following and strong brand.
"that [the  trademark] is probably one of the most recognizable logos I think in the CrossFit world.	Trial Brief: pg.15  Testimony: (Leydon 17:10-18:16)		X Opinion Testimony. Not an out of court statement made by a third-party.	X Relevant to the notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Leydon has been highly involved in CrossFit as an athlete and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Leydon has been highly involved in CrossFit as an athlete and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.

Exhibit/Testimony Description	Trial Brief Citation	Objections					
		Irrelevant	Hearsay	Immaterial	Lacks Foundation	Lacks Personal Knowledge	Speculation
“...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.”	Trial Brief: pg. 16 Testimony: (Saran 45:8-17)	X Hybrid’s stones are all marked with its H trademark. Testimony is relevant to the notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Saran was testifying as to his personal knowledge.	X Hybrid’s stones are all marked with its H trademark. Testimony is relevant to the notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran travels to many CrossFit gyms and has personal knowledge of Mr. Orlando and the Hybrid Athletics’ brand notoriety.		X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran travels to many CrossFit gyms and has personal knowledge of Mr. Orlando and the Hybrid Athletics’ brand notoriety.
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.”	Trial Brief: pg. 16 Testimony: (Leydon 18:2-16, 19:14-23)	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.		X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics’ brand notoriety.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics’ brand notoriety.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of Mr. Orlando and the Hybrid Athletics’ brand notoriety.
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.	Trial Brief: pg.17	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
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.	Trial Brief: 17 (Orlando 62:11- 63:15, Exs. 10, 13-15); (Jentgen 44:10- 21)	X Relevant to notoriety of Hybrid Athletics Brand.			X Mr. Orlando and Mr. Jentgen have personal knowledge of Hybrid Athletics equipment and the Exhibits cited.	X Mr. Orlando and Mr. Jentgen have personal knowledge of Hybrid Athletics equipment and the Exhibits cited.	X Mr. Orlando and Mr. Jentgen have personal knowledge of Hybrid Athletics equipment and the Exhibits cited.
Because of his popularity, he received a lot of attention from consumers and fans and as a result sold a lot of inventory.	Trial Brief: pg. 17 Testimony: (Orlando 51:7- 53:10)	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Orlando has personal knowledge of the attention his brand received and Hybrid Athletics’ sales.		X Mr. Orlando has personal knowledge of the attention his brand received and Hybrid Athletics’ sales.		X Mr. Orlando has personal knowledge of the attention his brand received and Hybrid Athletics’ sales.

Exhibit/Testimony Description	Trial Brief Citation	Objections					
		Irrelevant	Hearsay	Immaterial	Lacks Foundation	Lacks Personal Knowledge	Speculation
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 Facebookpage, maintained since November 2011, featuring apparel, fitness equipment and gym services bearing the  trademark surpasses thirty thousand (30,000) "likes".	Trial Brief: pg. 18 Testimony: (Orlando Ex 2 ¶¶33-35).	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Orlando has personal knowledge of Hybrid Athletics' social media accounts and the Exhibits presented in support thereof.	X Relevant to notoriety of Hybrid Athletics Brand.			
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, these videos have been viewed well over 2 million times.	Trial Brief: pg.18 Testimony: (Orlando Ex 2¶¶36-38),(Orlando 28:3-10; Ex 2 ¶38)	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Orlando has personal knowledge of Hybrid Athletics' social media accounts, the videos posted featuring the Hybrid Athletics Brand and the Exhibits presented in support thereof.	X Relevant to notoriety of Hybrid Athletics Brand.		X Mr. Orlando has personal knowledge of Hybrid Athletics' social media accounts, the videos posted featuring the Hybrid Athletics Brand and the Exhibits presented in support thereof.	
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.	Trial Brief: pg.19 Testimony: (Castro 30:2- 21; Ex 1)	X Relevant to notoriety of Hybrid Athletics Brand.	X Not an out of court statement made by another. Furthermore, Mr. Castro witnessed individuals wearing the Hybrid H and thus has personal knowledge due to his heavy involvement in CrossFit.	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Castro has personal knowledge due to his heavy involvement in CrossFit.	X Mr. Castro has personal knowledge due to his heavy involvement in CrossFit.	X Mr. Castro has personal knowledge due to his heavy involvement in CrossFit.
He continues to make the  trademark relevant and well-known by wearing his branded merchandise at these Seminars.	Trial Brief: pg. 20 Testimony: (Castro 27:19-28:4, 31:10-22)		X Mr. Castro oversees the CrossFit Seminars and has personal knowledge due to his heavy involvement.		X Mr. Castro oversees the CrossFit Seminars and has personal knowledge due to his heavy involvement.	X Mr. Castro oversees the CrossFit Seminars and has personal knowledge due to his heavy involvement.	X Mr. Castro oversees the CrossFit Seminars and has personal knowledge due to his heavy involvement.
Each of these attendees are exposed to the  trademark and many purchase, if they do not already own,  trademark apparel.	Trial Brief: pg. 20 Testimony: (Orlando 96:16- 98:15)	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Orlando runs his seminars and has personal knowledge of the Hybrid's brand placement and sales.		X Mr. Orlando runs his seminars and has personal knowledge of the Hybrid's brand placement and sales.	X Mr. Orlando runs his seminars and has personal knowledge of the Hybrid's brand placement and sales.	X Mr. Orlando runs his seminars and has personal knowledge of the Hybrid's brand placement and sales.

Exhibit/Testimony Description	Trial Brief Citation	Objections					
		Irrelevant	Hearsay	Immaterial	Lacks Foundation	Lacks Personal Knowledge	Speculation
He's a fixtures in the [CrossFit] community."	Trial Brief: pg.21 Testimony: (Saran 44:8-17)	X Relevant to notoriety of Hybrid Athletics Brand.	X Opinion Testimony. Not an out of court statement made by a third-party.	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.
Mr. Orlando is "well known in the CrossFitcircles,"	Trial Brief: pg.21 Testimony: (Tuthill 15:12-18:9)	X Relevant to notoriety of Hybrid Athletics Brand.	X Opinion Testimony. Not an out of court statement made by a third-party.	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Tuthill is heavily involved in the fitness community as deputy editor of <u>Muscle &amp; Fitness</u> . Mr. Tuthill has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Tuthill is heavily involved in the fitness community as deputy editor of <u>Muscle &amp; Fitness</u> . Mr. Tuthill has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Tuthill is heavily involved in the fitness community as deputy editor of <u>Muscle &amp; Fitness</u> . Mr. Tuthill has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.
Being a writer for such a popular magazine has given Mr. Orlando and his  famous brand further notoriety and recognition.	Trial Brief: pg. 22 Testimony: (Orlando 91:11-92:4)	X Relevant to notoriety of Hybrid Athletics Brand.	X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.	X Relevant to notoriety of Hybrid Athletics Brand.	X Mr. Orlando has personal knowledge as to the statements made to him.		X Mr. Orlando has personal knowledge as to the statements made to him.
In 2010, JACO clothing company sponsored Mr. Orlando due to his notoriety as a CrossFit athlete.	Trial Brief: pg.22	X Improper Objection fails to object to numerous cites to actual evidence		X Improper Objection fails to object to numerous cites to actual evidence	X Improper Objection fails to object to numerous cites to actual evidence	X Improper Objection fails to object to numerous cites to actual evidence	X Improper Objection fails to object to numerous cites to actual evidence
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.	Trial Brief: pg. 23 Testimony: (Orlando 103:22-104:2); see also (Paulson 26:20-23, 27:1-2)	X Relevant to Hylete's knowledge of the Hybrid Athletics Brand and previous working relationship.					X Mr. Orlando and Mr. Paulson have personal knowledge as to the parties working relationship.

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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..."	Trial Brief: pg. 24 Testimony: (Orlando 121:4-122:18, Ex. 37)		X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.		X Both Mr. Orlando and Mr. Paulson have personal knowledge as to the statements made to them. (Paulson 44:24-45:3)	X Both Mr. Orlando and Mr. Paulson have personal knowledge as to the statements made to them. (Paulson 44:24-45:3)	X Both Mr. Orlando and Mr. Paulson have personal knowledge as to the statements made to them. (Paulson 44:24-45:3)
Ian Jentgen, Opposer's head trainer has even received selected advertisements from Applicant on his Facebook page, stating the page was "sponsored by Applicant."	Trial Brief: pg. 25-26 Testimony: (Jentgen 97:18 - 102:2)	X Relevant to Hylete's marketing and channels of trade.	X Mr. Jentgen has personal knowledge of the advertisements he received.	X Relevant to Hylete's marketing and channels of trade.	X Mr. Jentgen has personal knowledge of the advertisements he received.	X Mr. Jentgen has personal knowledge of the advertisements he received.	X Mr. Jentgen has personal knowledge of the advertisements he received.
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.	Trial Brief: pg. 26 Testimony: (Paulson 33:14- 34:5)	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Paulson's testimony as to his why Mr. Paulson/Hylete pursued Hybrid Athletics is not made by a third party, but the declarant himself.	X Relevant to notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Paulson has personal knowledge as to his own state of mind and the business decisions of Hylete.	X Mr. Paulson has personal knowledge as to his own state of mind and the business decisions of Hylete.	X Mr. Paulson has personal knowledge as to his own state of mind and the business decisions of Hylete.
"[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..."	Trial Brief: pg. 27 Testimony: (Orlando 124:7-125:25)		X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.	X Relevant to actual confusion between the marks as well as the notoriety of Mr. Orlando and the Hybrid Athletics Brand.	X Mr. Orlando has personal knowledge as to statements made to him.	X Mr. Orlando has personal knowledge as to statements made to him.	X Mr. Orlando has personal knowledge as to statements made to him.

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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."	Trial Brief: pg. 27 Testimony: (Orlando 129:21-130:13)		X Confusion witnessed and statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.		X Mr. Orlando has personal knowledge as to confusion witnessed and statements made to him.	X Mr. Orlando has personal knowledge as to confusion witnessed and statements made to him.	X Mr. Orlando has personal knowledge as to confusion witnessed and statements made to him.
Confusion is witnessed everywhere by Mr. Orlando and Opposer's representatives, media, including on social	Trial Brief: pg. 27		X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
For instance, on Instagram, consumers have used hashtags in the following manner, "at Hybrid athletics at Train Hylete."	Trial Brief: pg. 27 Testimony: (Jentgen 93:4- 97:17; 100:7-104:9); see also (Leydon 23:24- 24:14)	X Relevant to actual confusion between the marks.	X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.	X Relevant to actual confusion between the marks.		X Mr. Jentgen has personal knowledge as to the social media posts he reviews.	X Mr. Jentgen has personal knowledge as to the social media posts he reviews.
Alleged consumer confusion emails	Trial Brief: pg. 28-31		X Improper Objection fails to object to numerous cites to actual evidence.  Confusion witnessed and statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.	X		X Improper Objection fails to object to numerous cites to actual evidence.  Mr. Orlando has personal knowledge as to the messages sent to him.	X Improper Objection fails to object to numerous cites to actual evidence.  Mr. Orlando has personal knowledge as to the messages sent to him.

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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.'	Trial Brief: pg. 31 Testimony: (Null 38:15- 39:6)		X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.		X Ms. Null has personal knowledge as to the conversations she had with Hylete's employees and Mr. Castro.	X Ms. Null has personal knowledge as to the conversations she had with Hylete's employees and Mr. Castro.	X Ms. Null has personal knowledge as to the conversations she had with Hylete's employees and Mr. Castro.
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?"	Trial Brief: pg.29 Testimony: (Orlando 133:19-134:10, Ex 41)	X Relevant to actual confusion between the marks.	X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.			X Mr. Orlando has personal knowledge as to the messages sent to him.	X Mr. Orlando has personal knowledge as to the messages sent to him.
Mr. Lester writes back, "Thanks Rob. So this is just more confusion."	Trial Brief: pg.29 Testimony: (Orlando 137:16-17; Ex 43)	X Relevant to actual confusion between the marks.	X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.	X Relevant to actual confusion between the marks.		X Mr. Orlando has personal knowledge as to the messages sent to him.	X Mr. Orlando has personal knowledge as to the messages sent to him.
"did you know a copy of your brand means that you succeed . . . Here it is: <a href="http://www.hylete.com">http://www.hylete.com</a> ."	Trial Brief: pg.30 Testimony: (Orlando 140:15-141:5, Ex. 46)	X Relevant to actual confusion between the marks.	X Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.	X Relevant to actual confusion between the marks.		X Mr. Orlando has personal knowledge as to the messages sent to him.	X Mr. Orlando has personal knowledge as to the messages sent to him.

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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.	Trial Brief: pg.31 Testimony: (Saran 74:17-23)		X Not an out of court statement made by another. Mr. Saran personally testified to his personal knowledge and opinion.		X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.	X Mr. Saran has been highly involved in CrossFit as an athlete, attorney and now its General Counsel. Mr. Saran has personal knowledge of Mr. Orlando and the Hybrid Athletics' brand notoriety.
The people at the Hylete booth told Mr. Castro that "this isn't Rob Orlando's...this is a different company."	Trial Brief: pg. 31 Testimony: (Castro 38:11- 24)	X Relevant to actual confusion between the marks.	X It is undisputed that the parties are unrelated. Statements/documents are either 1) not offered for the truth of the statements but rather simply for the fact that they were made; 2) are admissible as a present sense impression; or 3) admissible as to state of mind.		X Mr. Castro has personal knowledge of the statements made to him, which were corroborated by Hylete's own witness, Ms. Null.		
As a result of Hylete's entrance into the market, Opposer's clothing sales have been greatly affected.	Trial Brief: pg. 32 Testimony: (Jentgen 102:3- 21, 142:6-143:16)	X Relevant to actual confusion between the marks and lost sales.	X Not an out of court statement made by another. Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.	X Relevant to actual confusion between the marks and lost sales.	X Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.	X Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.	X Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.
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, they could potentially crush me."	Trial Brief: pg. 32 Testimony: (Orlando 127:3-129:6)	X Relevant to confusion between the marks and lost sales.		X Relevant to confusion between the marks and lost sales.			X Mr. Orlando has personal knowledge as to confusion between the marks and lost sales.

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Opposer has been harmed due to Applicant leading purchasers to Hylete's products as opposed to Hybrid Athletics.	Trial Brief: pg. 32 Testimony: (Jentgen 97:18-100:6)				X Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.	X Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.	X Mr. Jentgen has personal knowledge as to instances of confusion and the diminished sales of Hybrid's goods.
Opposer's  trademark, is a very strong, bold, distinctive mark.	Trial Brief: pg.36				X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
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.	Trial Brief: pg. 36 Testimony: (Saran 74:17-23); (Orlando 157:16-158:11); (Martinez 90:2-91:17)		X Not an out of court statement made by another. Testimony based on declarants personal knowledge and familiarity with the fitness community.		X Testimony based on declarants personal knowledge and familiarity with the fitness community.	X Testimony based on declarants personal knowledge and familiarity with the fitness community.	X Testimony based on declarants personal knowledge and familiarity with the fitness community.
The two marks at issue are both representations of the letter "H," however, the confusion lies in the nature and stylized design of the H as well as in what each H represents, i.e. "Hybrid Athletics" versus "Hylete," a.k.a. "Hybrid Athlete."	Trial Brief: pg.36	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.			
This is not simply a matter of if there are other "H" marks in the general marketplace.	Trial Brief: pg.36	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.
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	Trial Brief: pg.37		X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
Opposer has made  over the last eight years, marketing, promoting, offering for sale and selling goods and services branded with the  trademark.	Trial Brief: pg.36	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.		

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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.	Trial Brief: pg.37	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.			
Millions of fans and consumers have had access to and have viewed Opposer's marketing and promotions.	Trial Brief: pg.38		X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.
"I would think pretty much every gym sells clothing."	Trial Brief: pg. 42  Testimony: (Leydon 13:24-25)	X Relevant to trade channels.		X Relevant to trade channels.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of CrossFit gyms selling merchandise.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of CrossFit gyms selling merchandise.	X Mr. Leydon has been highly involved in CrossFit as an athlete, CrossFit seminar instructor and gym owner. Mr. Leydon has personal knowledge of CrossFit gyms selling merchandise.
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.	Trial Brief: p g . 42				X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.
(Mr. Orlando and Mr. Jengten testifying to consumers pointing the Hylete "H" and excitedly saying they supported Opposer's brand)	Trial Brief: pg.45	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.		X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.	X Improper Objection fails to object to numerous cites to actual evidence.

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Opposer believes that Hylete has greatly caused harm to Opposer by misleading consumers to purchase Hylete's products as opposed to Hybrid Athletics'.	Trial Brief: pg.49 Testimony: (Jentgen 97:18- 100:6)			X Relevant to actual confusion and lost sales.	X Mr. Jentgen has personal knowledge of lost sales and consumer confusion.	X Mr. Jentgen has personal knowledge of lost sales and consumer confusion.	X Mr. Jentgen has personal knowledge of lost sales and consumer confusion.

**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing **REPLY BRIEF OF OPPOSER HYBRID ATHLETICS, LLC** was served by electronic mail and by first class mail, postage prepaid, on the Correspondent for the Hylete as follows:

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

May 11, 2016  
Date

/s/ Joan M. Burnett  
Joan M. Burnett