

# Hearsay

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## Mudder of all battles

Think it takes endurance to complete a 10-mile "Tough Mudder" obstacle course? Try chasing reimbursement for a "sham" event held under the Tough Mudder banner, say four plaintiffs whose lawsuit over the 2014 race "Mudderella Boston" is set to go to trial in Worcester Superior Court next month.

Mudderella Boston became a misnomer when it was moved at the 11th hour nearly 80 miles away to Westbrook, Maine, after organizers failed to secure permits in two north-of-Boston suburbs.

Since being filed on Sept. 2, 2014, the proposed class action has already been to U.S. District Court, then up to the 1st U.S. Circuit Court of Appeals, then to Superior Court, and then to the state Appeals Court before winding up in what initially appeared to have been a successful mediation process.

However, when the date came and went for Tough Mudder to pay the settlement amount, the plaintiffs rushed back to Superior Court.

In addition to wanting out of the settlement agreement, the plaintiffs have asked Judge **Anthony M. Campo Jr.** for a temporary restraining order and preliminary injunction, fearing that Tough Mudder "plans to sell its assets or to otherwise make Tough Mudder judgment proof."

Specifically, they believe that Tough Mudder intends to split into two entities, a "thriving gym business" known as Tough Mudder Bootcamp and a "struggling" obstacle-course business.

That "struggling" obstacle-course business is nonetheless actively accepting entry fees for 30 events scheduled from coast to coast in 2019, according to its website.

In all, 11,307 people paid \$1.065 million collectively to participate in Mudderella Boston 2014, according to the plaintiffs' complaint. They thought they were signing up for an event in Haverhill but, with the race a little over two weeks away, participants were told that it was being moved to Amesbury.

The bigger surprise came a week later, when the event was relocated yet again, this time to Westbrook, Maine.

Perhaps unsurprisingly, the shifting sites resulted in nearly 7,000 no-shows. Tough Mudder rejected requests to



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refund registration fees, instead offering to apply those fees to another 2014 or 2015 event.

With their initial complaint, which was amended two months later, the plaintiffs sought certification of at least two classes: those who had paid Mudderella Boston registration fees and did not participate in the Maine event, and those who did participate but incurred additional gas, food and lodging expenses from having to head farther north than expected.

In the years that followed, the 1st Circuit and then the Appeals Court found that the plaintiffs were bound by a mediation and arbitration clause they had signed, so off to mediation the parties went.

The two sides spent a full day this past Sept. 20 with **Eric Van Loon** of JAMS in Boston, for which the plaintiffs paid over \$8,300. But it appeared to have been money and time well spent, as the parties reached an agreement, which called for Tough Mudder to pay a settlement by Nov. 26.

When that date passed with no payment, the plaintiffs' lawyers made several inquiries to Tough Mudder, finally learning on Dec. 6 that the company did not intend to pay the settlement amount, according to the plaintiffs' complaint.

In a declaration filed with the Superior Court Dec. 26, Tough Mudder President **Don Baxter** explains that the company had "fully intended" to pay up.

"Due to circumstances beyond Tough Mudder's control, however, by the time the settlement payment was due, Tough Mudder did not then have the means or ability to make the payment," Baxter states.

However, Baxter adds that the company does intend to make good on the deal — eventually.

The plaintiffs have asked Campo for rescission not only of the mediated settlement agreement but also the clause in their agreement with Tough Mudder requiring them to submit to binding arbitration in the event of a failed mediation process.

In a memorandum in support of their motion for a temporary restraining order and preliminary injunction, the plaintiffs note that the Appeals Court has already looked askance at the agreement, saying the plaintiffs had raised "colorable claims" as to "whether the contract as a whole may be both illusory and unconscionable." That is because Tough Mudder had reserved for itself the right to cancel the event for any reason and keep the registration fees.

"Such an interpretation arguably implicates the implied covenant of good faith and fair dealing," the Appeals Court notes in its May 7, 2018, opinion.

Baxter urges Campo not to grant the relief the plaintiffs are seeking, saying it "would result in significant damage to the company's financial condition."

At a Dec. 27 hearing, Campo took action on neither the plaintiffs' motion for relief from the Jan. 24, 2017, judgment compelling mediation nor the motion for a restraining order, according to **James L. O'Connor Jr.** of Nickless, Phillips & O'Connor of Boston. O'Connor is representing the plaintiffs with **Barry M. Altman** of Altman & Altman in Wilmington.

Campo instead set a trial date for Feb. 11, according to O'Connor, who declined further comment while the case is pending.

Tough Mudder is being represented by **Michael J. Tuteur** and **Olivia B. Luckett**, of **Foley & Lardner** in Boston. They had not responded to requests for comment as of press time.

— KRIS OLSON

## 'Scream' team

Whether Celtics guard **Terry Rozier** committed a costly foul when he (or people acting on his behalf) incorporated the "Ghost Face Mask" popularized by the horror movie series "Scream" into T-shirts and other merchandise depends on whom you ask.

For **Craig B. Sanders**, the New York attorney for purported copyright holder **Easter Unlimited, d/b/a Fun World**, his client is "halfway home" due to the clear commercial use of its intellectual property, which obviates a "fair use" defense.

But though Sanders sees it as a fairly straightforward infringement matter, Rozier's Cleveland-based attorney, **Patrick Kabat**, thinks it may be anything but.

In its complaint, Easter Unlimited — a designer, manufacturer and supplier of original costumes and masks and novelty gifts — claims to be the original designer of the Ghost Face Mask, which it licensed in 1996 for use in the "Scream" series.

But the movie "Scream" takes its name from the 1893 **Edvard Munch** painting, and the mask's features derive from that same "widely recognized" reference and basic elements of ghost-like faces, Kabat notes. That is just one way the boundaries need to be defined with regard to what rights Easter Unlimited owns, he says.

Easter Unlimited's creation is hardly the only Grim Reaper-type mask in the Halloween market, and Kabat suggests there is a "real issue about protectability," i.e., whether copyright law would allow one company to own all manifestations of the character.

Beyond that, Kabat believes that Rozier has fair use and parody defenses to the infringement claim, given the way the image was transformed and used in an "entirely different context."

The law wants artists and others to be able to draw inspiration from and refer to previous works while creating something new, he says.

"Copyright doesn't allow people to carve up cultural icons and extract nuisance rents for new and creative uses," he argues. "Ultimately, copyright wants more speech, not less, and limits ownership to promote, not

inhibit expression."

According to published reports, Rozier, a longtime fan of the horror genre, took a shine to the "Scary Terry" moniker after it was coined by Barstool Sports podcaster **Coley Mick**.

Rozier told GQ magazine that the first edition of Scary Terry merchandise featured the character Jason from the "Friday the 13th" movie series, but he was partial to "Scream" and insisted the Ghost Face Mask top the caricature of him in his green-and-white uniform on official Scary Terry gear.

According to Rozier's account to GQ, sales of Scary

Terry merch spiked as Rozier took on a more prominent role with the Celtics during its improbable 2018 playoff run.

"It was heartening to see such a receptive fan response to Terry's persona and his dialogue with

his fans," Kabat says.

However, some of that enthusiasm may have led to the creation of a number of pirated versions of the Scary Terry gear, including versions sold by a number of outlets listed in Easter Unlimited's complaint, according to Kabat.

By the estimation of Boston IP lawyer **Thomas E. Kenney**, Easter Unlimited's copyright claims are stronger than those based in trademark. With the latter, it would need to prove a likelihood of confusion between Rozier's activities and its own. Indeed, publicity surrounding the current dispute should help dispel the notion that there is an affiliation between the two, Kenney says.

Sanders says his clients generally fall into one of two categories, and that Easter Unlimited is unlike the artists who feel disrespected by the unauthorized use of their creations and want to use trademark and copyright enforcement to punish the infringer. Easter Unlimited merely wants to recover royalties to which it believes it is entitled, he says.

Kabat, too, says he is hopeful the matter can reach a "mutually acceptable, amicable resolution."

Perhaps owing to that mutual desire to settle the matter, on Dec. 13 Magistrate Judge **Arlene R. Lindsay** in the Eastern District of New York granted Rozier an extension to Jan. 21 to "answer, move or otherwise respond to the complaint."

— KRIS OLSON



SCARY TERRY