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

Proceeding	91173105
Party	Defendant Michael Dalton
Correspondence Address	Michael Dalton P.O. Box 18137 670 Northland Blvd. Cincinnati, OH 45218-0137 UNITED STATES DALTONME@hotmail.com
Submission	Reply in Support of Motion
Filer's Name	Michael Dalton
Filer's e-mail	DALTONME@hotmail.com
Signature	/ Michael Dalton /
Date	04/08/2009
Attachments	ReplyOppDismiss.pdf ( 9 pages )(4766207 bytes )

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

Honda Motor Co. LTD	:	
	:	
Opposer	:	
	:	
vs.	:	Opposition No. 91173105
	:	
Michael Dalton	:	
	:	
Applicant	:	

**REPLY TO PLAINTIFF'S OPPOSITION TO APPLICANT'S RULE 2.132**  
**MOTION TO DISMISS**

Now comes Defendant – Applicant, Michael Dalton, in reply to plaintiff's opposition to defendant's Rule 2.132 motion to dismiss and states as follows:

Applicant does not object to Opposer's request to disregard their first opposition filed, to this motion, and therefore replies to Opposer's oppositions as one and the same.

Applicant hereby incorporates by reference its prior motions to strike and its motion to dismiss and applicant's reply to Opposer's opposition of each.

The Opposer's opposition to Applicant's Rule 2.132 motion lacks merit.

The Opposer cites an alleged proper filing of a Notice of Testimony of Mangham. This argument fails as untimely<sup>1</sup>, lying outside the testimony period and lacks the proper certificate of service, which must be made before the paper, will be considered by the office<sup>2</sup>.

Proof of such service must be made before the Office will consider the paper.

The certificate statement must be signed by the attorney or other authorized

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<sup>1</sup> See Applicant's Motion to Strike Mangham

<sup>2</sup> Rule § 2.119

representative, attached to or appearing on the original paper when filed, clearly stating the date and manner in which service was made<sup>3</sup>. The record clearly reflects that Barbara Winterbie omitted the date of service, *see opposer's opposition to applicants Rule 2.132 Motion to dismiss exhibit 1, p.8.*

Additionally, the Opposer's claim that their Notice of Reliance and Notice of Testimony, *see opposer's opposition to applicants Rule 2.132 Motion to Dismiss exhibit 1* was properly submitted is also untimely and without merit as the certificate of service and facts prove otherwise. The Opposer states that FedEx served their Notice of Reliance on Oct. 27, 2008 to; Michael Dalton, Box 18137, 670 Northland Blvd., Cincinnati, Ohio 45218-0137, *see opposer's opposition to applicants Rule 2.132 Motion to Dismiss exhibit 1, p. 5; however,* the Opposer sent the FedEx package to the wrong address, omitting the Box 18137, and appears to have been sent on October 29, 2008<sup>4</sup>, *see applicants exhibit A* attached hereto. The applicant only received the package after the wrong recipient opened the package, at 1013 Garnea Drive, 45231, where it was delivered to the wrong address in late November, 2008 and the recipient found applicants phone number on an enclosed document and contacted the applicant. The Opposer failed to make the proper service and the office should not consider<sup>5</sup>.

The Opposer has been less than candid with the office regarding the Mangham deposition.

The Opposer argues that applicant had more than adequate notice of the Mangham deposition. Opposer's argument is without merit as the certificate of service

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<sup>3</sup> Id

<sup>4</sup> See *El Dorado Park Self Storage v. Marc Yelenich* Opposition No. 91159837 to application Serial No. 78202724 filed on January 13, 2003 *Decision Mailed: January 18, 2008*

<sup>5</sup> Id.

also fails to adhere to the rules of clearly stating the date of service and therefore proof of such service must be made before the paper will be considered by the Office,<sup>6</sup> *see opposer's opposition to applicants Rule 2.132 Motion to Dismiss exhibit 2, p. 4, exhibit 4 p.5.*

The Opposer's claim that they were proceeding under the auspices that the testimony period had remained open since July is without merit. The Opposer clearly asked that their testimony period be opened thirty days prior 10/27/2009. The board reset the testimony period as requested by Opposer. The Opposer is represented by council and should be fully aware that testimony extensions of time are granted for the purpose of testimony upon written questions not oral testimony. There would be no need for an extension of time to take oral testimony as by rule they are limited to 7 hours. The setting of testimony is the same as the setting of a court date. The applicant is not mandated to appear in court on a date that Opposer selects. The Opposer lacks jurisdiction to overrule the trial office.

Rule 2.132(a) provides that when a plaintiff fails to take testimony during its allotted time, judgment may be entered against it "in the absence of a showing of good and sufficient cause." The "good and sufficient cause" standard is equivalent to the "excusable neglect" standard of FRCP 6(b)(2). The Board, in *Pumpkin Ltd. v. The Seeds Corp.*, 43 USPQ2d 1582 (TTAB 1997), adopted the Supreme Court's four-factor test regarding excusable neglect, as set out in *Pioneer Invest. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 280 (1993).

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<sup>6</sup> Rule § 2.119, *id.*

In this instance, the Opposer set the parameters for the testimony period and the board agreed. It is the Opposer's responsibility to review and adhere to the orders in this matter.

Additionally, the Opposer fails to mention that they did not advised the board that they, in fact, were able to schedule their deposition during the period for which they claimed inability and abused the process by continuing the request that the testimony period be reset, *see opposer's opposition to applicants Rule 2.132 Motion to Dismiss exhibit 2*. Once the Opposer was able to schedule the Mangham deposition on August 12, 2008 (before the board ruled on Opposer's motion on August 20, 2008<sup>7</sup>), the Opposer should have advised the board, on August 15, 2008<sup>8</sup> and voluntarily dismissed their motion.

Instead, Opposer chose to conceal the facts from the board, to the prejudice of applicant, increasing the time of resolution, and the cost of litigation as applicant had non-refundable airline, motel and car rental arrangements. Opposer made an unnecessary delay in this matter and unjustly used that delay to further prepare their meritless opposition. Opposer's assertions are in bad faith and the board should reverse their August 20, 2008 decision to reset trial and hold that Opposer's testimony period ended on August 28, 2008 and dismiss this pending opposition.

Had applicant expended the time and expense to appear in the untimely deposition of Mangham on September 16, 2008 and the Opposer did not like the results of cross-examination, Opposer could assert that the Mangham testimony was not taken within the testimony period, through inadvertence, and Opposer could then have another bite at the

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<sup>7</sup> See case doc 20 entered 10/20/2008

<sup>8</sup> See case 19 entered 08/15/08

apple during their clearly assigned 30-day testimony period opening September 28, 2008 and closing on 10/27/08<sup>9</sup>. The applicant is entitled to equal protection and due process.

Opposer's exhibit 7 appears not involved with this pending matter, instead involving Taylor v. McKelvey.

The Opposer has not contested applicant's argument that Opposer has failed to establish standing. Honda America is not a party to this opposition. Even if the Mangham deposition were wrongly permitted, by Mangham's own admission there did not come a time when Honda America, Inc. used the term DealerDashboard<sup>10</sup>.

For the reasons stated, the Opposer's opposition to applicant's motion to strike and Opposer's opposition to applicant's motion to dismiss is presented in bad faith and applicant's motion to strike, motion to dismiss should be granted, and applicant should be permitted registration of their service mark and source identifier DealerDashboard.

Respectfully submitted,



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DALTONME@hotmail.com

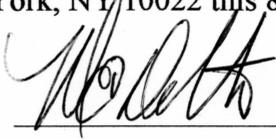
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<sup>9</sup> See case doc 42 entered 02/17/2009

<sup>10</sup> Without waiver of motion to strike, see Mangham deposition p. 15 line 13-16

Certificate of Service

I, Michael Dalton, hereby certify that this Reply to Opposition to Dismiss has been served by electronic email upon Opposor's council Dyan Finguerrs-Ducharme, dyan.finguerra-ducharme@wilmarhale.com and standard U.S. mail upon Dyan Finguerra-DuCharme at Wilmer Cutler Pickering Hale and Dorr LLP, 399 Park Ave, New York, NY 10022 this 8th day of April 2009.



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Michael Dalton, pro se  
PO Box 18137  
Cincinnati, Ohio 45218-0137  
(513) 557-2901  
DALTONME@hotmail.com

# Exhibit A

6.27.10  
10.29  
A 4733 345

Express

PS/Ship - FedEx Label

TO AN  
ADDRESS.

United States Postal

only. When a P.O. Box  
package may be sent

Code Was

address and reroute

ping to you of your  
as. This will help us  
shipper) the \$10.00

States Postal Service.

From: Origin ID JHBA (212)230 8800  
Dyan Figueroa Buchanan  
Whiteland  
359 Park Avenue  
New York, NY 10022

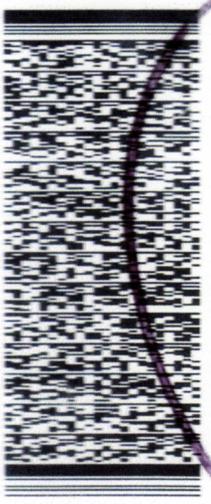


SHIP TO (613)622-0909  
Michael Dalton

BILL SENDER

670 Northland Boulevard

Cincinnati, OH 452180137



Ship Date  
Account  
Delivery

**FedEx Urgent**

Name: *Michael Dalton*

Company: \_\_\_\_\_

Address: *1013*

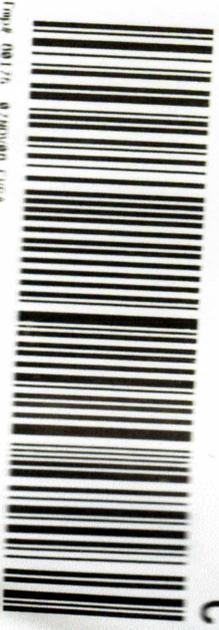
City, State, Zip: *Cent OH 45223*

Telephone: \_\_\_\_\_

TRK

FedEx  
TRK  
7901 2200 6242

62 CVGA



45231  
OH-US  
CVG

WED - 29 OCT A1  
\*\* 2DAY \*\*

RELEASE # 0534  
WED 10/29/09

From: Origin ID: JRBA (212)230-8800  
Dyan Figuerra-Ducharme  
WilmerHale  
399 Park Avenue  
  
New York, NY 10022



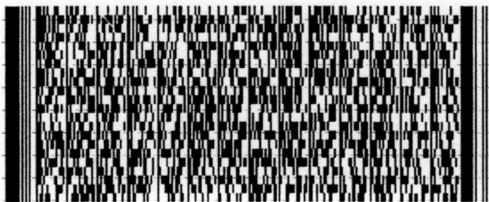
CLS00108/21/04

SHIP TO: (513)522-6969 **BILL SENDER**

**Michael Dalton**

**670 Northland Boulevard**

**Cincinnati, OH 452180137**



Ship Date: 27OCT08  
ActWgt: 1 LB  
CAD: 1045751/WBUS0200  
Account#: S \*\*\*\*\*

Delivery Address Bar Code



Ref # 0103443.00320-11335  
Invoice #  
PO #  
Dept #

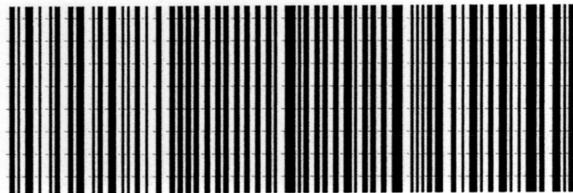
RELEASE#: 3785346

TRK# 7901 2200 6242  
0201

**WED - 29OCT A2**  
**\*\* 2DAY \*\***

**SA CVGA**

**45218**  
**OH-US**  
**CVG**



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← FOLD on this line and place in shipping pouch with **bar code and delivery address** visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.