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

Proceeding	91172228
Party	Plaintiff Master Lock Company LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of application Serial No. 78/433,102  
Published in the Official Gazette on June 6, 2006

<i>MASTER LOCK COMPANY, LLC,</i>	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91/172,228
	:	
<i>THOMAS P. EIDSMORE,</i>	:	<b>UN-REDACTED COPY</b>
	:	<b>FILED UNDER SEAL</b>
Applicant.	:	<b>PURSUANT TO STIPULATED</b>
	:	<b>PROTECTIVE ORDER</b>

**OPPOSER MASTER LOCK COMPANY, LLC'S  
REPLY BRIEF IN SUPPORT OF ITS MOTION  
FOR SUMMARY JUDGMENT AS TO APPLICANT'S  
LACK OF BONA FIDE INTENT TO USE THE APPLIED-FOR MARK**

Applicant's Response to Opposer's Motion for Summary Judgment identifies just two facts regarding his alleged *bona fide* intent to use the applied-for mark: 1) his now nearly four-year-old registration of a domain name for a website, which, to this day, remains devoid of any mention or suggestion of Applicant or the goods identified in the '102 Application;<sup>1</sup> and 2) what Applicant's counsel characterizes as Mr. Eidsmore's "existing business."

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<sup>1</sup> Applicant's registration of a domain name was addressed in Opposer's initial Memorandum. For the reasons set forth therein, it is clear that, if anything, Applicant's reservation of a domain name and subsequent failure to build a website further corroborate the conclusion that Applicant merely intended to reserve rights in a name, not make a use in commerce. In the face of the totality of circumstances of this case, as a matter of law, Applicant's domain name registration fails to create an issue of material fact.

With respect to the second point, Applicant's "existing business," Applicant's Opposition Brief baldly mischaracterizes Applicant's testimony and disregards several relevant facts.

First, Applicant's Brief fails to mention Applicant's deposition testimony showing that he is the sole employee of his "business" with various responsibilities which include tending to the management of his family's properties. See Exh. A, Dep Tr. Eidsmore at p. 18, lines 7-8; p. 9, lines 18-19; p. 18, line 16 – p. 19, line 1. The Brief also fails to mention that Mr. Eidsmore himself characterizes his activities involving the resale of vehicles as "part hobby," and that this vehicle resale part of his "business," Eidsmore Enterprises, appears to be conducted on an *ad hoc* basis,

**REDACTED**

Q. And what is your business?

A. I buy and sell trucks, SUVs and luxury cars. I'm a wholesaler.

Q. Okay.

A. And I manage properties that my family owns.

Q. Approximately what volume of cars do you buy and sell on an annual basis?

A. Oh, not many. Probably 15. It's part hobby, part source of income.

Exh. A, Dep Tr. Eidsmore at p. 9, lines 14-24.

**INFORMATION APPLICANT  
DESIGNATED AS "HIGHLY  
CONFIDENTIAL" PURSUANT TO THE  
AGREED UPON PROTECTIVE ORDER  
HAS BEEN REDACTED FROM THIS PAGE.  
A FULL, UN-REDACTED VERSION  
OF THIS BRIEF AND THE  
ACCOMPANYING "EXHIBIT N" ARE  
CONTEMPORANEOUSLY  
BEING FILED UNDER SEAL**

Exh. N, Highly Confidential Portion of Dep. Tr. of Eidsmore at p. 19, line 13 - p. 20, line 5. In view of the foregoing testimony, Applicant's characterization of himself as "the owner of a dealership," (*see* Opp. Br. at p. 6 and Exh. A, Dep. Tr. Eidsmore at p. 21, lines 5-6) and his counsel's repeated characterization of Applicant as a "wholesaler of trucks and SUVs" (*see* Opp. Br. at pp. 5, 6) would seem to be great exaggerations.

Second, Applicant's Opposition Brief tries to draw some connection between Applicant's hobby/business and the goods recited in the '102 Application in an attempt to find some evidence to support the '102 Application. Applicant's Opposition Brief wrongly states that Applicant's business "relates to the truck and SUV products named as the specified goods in the '102 Application" and that the "Domain Name Registration and the '102 Application both relate directly to his existing business and are an obvious extension of that business." Opp. Br. at 6-7. The record contradicts both these statements. Applicant testified that his hobby/business of buying vehicles and reselling them involves upgrading certain existing features of the vehicles as follows:

Q. Can you explain to me the types of things you do to make it better?

A. Put bigger brakes on it, softer suspension, more advanced electrical systems, exhaust systems.

Q. What are the purposes of adding -- doing these improvements? What do they help the end user -- What's the end goal of these improvements?

A. The car is safer, performs better. It's safer both actively and passively, so it's more -- also more enjoyable to own and operate.

Exh. A, Dep. Tr. Eidsmore at p. 13, lines 4-18.

Q. And what is the most common type of improvement you do?

A. New brakes. New tires. And take it to the dealership of the make of the vehicle and have them run their electrical diagnostic tests on it and update software, stuff like that.

*Id.* at p. 17, ll. 9-15. The goods recited in the '102 Application, on the other hand, have nothing to do with these types of upgrades to standard features, but rather include “truck and sport utility vehicle accessories, namely, truck bed liners, cargo storage bins, mechanically assisted self-contained insert dump units for pickup trucks, body panels and tail gates.” *See* Exh. D, '102 Application. Applicant did not testify, and there is no evidence to show, that Applicant or Eidsmore Enterprises has ever made any of the goods recited in the '102 Application, installed any such goods onto a vehicle or has any present capability to do so. Contrary to Applicant's Opposition Brief, the record shows that the goods recited in the '102 Application are not an “obvious extension” of Applicant's existing hobby/business, which may or may not resell 15 vehicles in a year.

Third, Applicant's Opposition Brief overlooks the fact that, despite his hobby/business, Applicant has neither the capability nor the expertise to make or install the types of goods identified in the '102 Application. Applicant testified that Eidsmore Enterprises has no employees, and that he either does all the improvements to the vehicles himself or takes them to various mechanics shops:

Q. Do you have any employees?

A. Nope.

Q. Do you do all of the improvements yourself?

A. Or at mechanics shops.

Q. Is there any mechanic shop that you primarily use?

A. No. It varies from vehicle to vehicle.

*Id.* at p. 18, lines 6-15. Applicant admitted that none of the mechanics shops he has used install cargo storage bins, such as those recited in the '102 Application. *Id.* at p. 36, lines 13-17. When asked if he had any idea where someone might go to have a cargo storage bin installed on a vehicle, Applicant testified he did not -- tellingly, he did not identify Eidsmore Enterprises as such a place. *Id.* at p. 36, lines 4 -12. Likewise, with respect to the “mechanically assisted self-

contained dump units” identified in the ‘102 Application, Applicant’s testimony makes clear he would not know how such a device might attach to a vehicle:

Q. And how would they attach to the truck or the SUV?

A. What?

Q. The mechanically assisted self-contained insert dump unit for pickup trucks.

A. Who knows? There’s a couple products being sold that I believe are bolted to the back of the cab, I believe. I’m not sure. I’m not an engineer or else I would give you a better answer.

*Id.* at p. 40, lines 8-19. Applicant’s testimony as to the remainder of the goods recited in the ‘102 Application is similar. *See generally, id.* at pp. 30-40. Thus, it is clear that Applicant would need to take many steps before bringing any of the goods recited in the ‘102 Application to market. Yet, as discussed in Opposer’s initial Memorandum, the record shows Applicant has not taken even the first of these steps.

In sum, Applicant’s testimony unequivocally shows that Applicant lacks both the expertise and the capability to make or install any of the goods identified in the ‘102 Application. Despite this, Applicant readily admits that he has not discussed use of the MASTERHAUL Mark with anyone, nor does he even have any plans to discuss use of the mark with anyone. *See* Opposer’s initial Memorandum at pp. 7-8.

The remainder of Applicant’s Opposition Brief attempts to draw force away from the undisputed facts set forth in Opposer’s Memorandum by positing so-called “inferences” that could be drawn in Applicant’s favor. It is one thing to view the facts in the light most favorable to the non-movant, but it is quite another thing to disregard the non-movant’s unequivocal deposition testimony and discovery responses in favor of conjecture and speculation. *See Chambers v. Walt Disney Co.*, 132 F. Supp. 2d 1356, 1363 (M.D. Fla. 2001) (“Speculation does not create a genuine issue of fact; instead it creates a false issue, the demolition of which is a primary goal of summary judgment.”). The law is clear that, to survive summary judgment, the

non-movant must come forward with evidence that creates a genuine issue of material fact. Fed. R. Civ. P. 56(e); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A factual dispute is “genuine” only if the non-movant’s evidence is substantial enough to warrant a trial. *Anderson*, 477 U.S. at 251-52. Rather than presenting evidence giving rise to a genuine issue of material fact, Applicant’s Opposition Brief offers mischaracterizations of the record and speculation. The mischaracterizations of Applicant’s existing business contained in Applicant’s Opposition Brief do not constitute evidence of Applicant’s *bona fide* intent to use the MASTERHAUL mark in commerce.

Stripped of its mischaracterizations and speculation, Applicant’s Opposition Brief puts forward just one document, the domain name registration, allegedly establishing Applicant’s good faith intent to use the MASTERHAUL Mark. But, Applicant’s Opposition Brief fails to offer any explanation as to how Applicant’s ownership of a domain name for a vacant website evidences his intent to make an actual use in commerce of the MASTERHAUL Mark in connection with the goods recited in the ‘102 Application. In view of the totality of circumstances, this single document is insufficient to warrant a trial on the issue of Applicant’s *bona fide* intent.

In sum, based on the evidence of record, no reasonable fact finder could conclude that Applicant acted with objective good faith when he alleged that he had a *bona fide* intent to use the MASTERHAUL mark in the ordinary course of trade in connection with his recited goods. For all the reasons set forth in Opposer’s initial Memorandum and above, Opposer respectfully requests that the Board grant Opposer’s Motion for Summary Judgment and deny Applicant’s cross-request for entry of summary judgment in his favor.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct redacted copy and a true and correct un-redacted copy of the foregoing **OPPOSER MASTER LOCK COMPANY, LLC'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO APPLICANT'S LACK OF BONA FIDE INTENT TO USE THE APPLIED-FOR MARK** were served by hand delivery, on April 3, 2008, on the following attorney for Applicant:

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1100 Superior Avenue  
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Phone: (216) 861-5582  
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*BY: /Georgia E. Yanchar/*  
An Attorney for Opposer

**Exhibit N**  
**(redacted)**

**ORIGINAL OF TRANSCRIPT**

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

In the matter of Application Serial No. 78/433,102

For the mark: MASTERHAUL

Published in the Official Gazette on June 6, 2006

MASTER LOCK COMPANY, LLC,

Opposer,

vs.

No. 91/172,228

THOMAS P. EIDSMORE,

Applicant.

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**CONFIDENTIAL**

**DEPOSITION OF THOMAS P. EIDSMORE**

Taken on Friday, July 13, 2007 at 9:04 a.m.

At the offices of:

621-A Water Street

Santa Cruz, California

Reported By: KATHLYN E. WIRICK, CSR 2875, CP



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1 renew leases, find renters.

2 Q. Is there a corporation that  
3 all those properties are managed under?

4 A. My -- M & P Properties is  
5 the name.

6 Q. "M" as in Mary, "P" as in  
7 Paul?

8 A. Marion, yeah.

9 Q. And are you a personal  
10 owner, do you have an interest in M & P  
11 Properties?

12 A. No.

13 \* \* \* \* \*

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17 THIS PORTION DEEMED HIGHLY CONFIDENTIAL  
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\* \* \* \* \*

Q. Tell me about your personal vehicles. What vehicles do you own?

A. Classic -- A classic Cadillac that I'm restoring.

Q. Any others?

A. A couple older Ferraris.

Q. Any others?

A. No.

Q. Have you ever owned a truck?

A. Personally, no.



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