
No. 35869-7-II

The Court of Appeals of the State of Washington

Division II

CUSTOM AUTO INTERIORS, INC.,

Plaintiff/Appellee,

v.

CUSTOM RV INTERIORS, INC., et al.,

Defendants/Appellants,

APPEAL FROM CLARK COUNTY SUPERIOR COURT
THE HONORABLE ROGER BENNETT, JUDGE
CLARK COUNTY CAUSE NO. 06-2-06432-5

REPLY BRIEF OF APPELLANT

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BRIEF IN REPLY

A. INTRODUCTION

This dispute is not merely between Plaintiff-Respondent Custom Auto Interiors, Inc. (“Custom Auto”) and Defendant-Appellant Dave & LJ’s Custom RV Interiors, Inc. (“Dave & LJ’s”). Rather, it is a dispute between Custom Auto and any business using the term “custom RV interiors” to compete against Custom Auto in the market for providing custom RV interiors. The relationship between the parties is irrelevant – if an injunction – based on essentially no evidence – is enforceable against Dave & LJ’s then it is enforceable against the world. A ruling that “custom RV interiors” is protectable—which is necessary to uphold the injunction—removes the term from the English language for people who provide custom RV interiors. Protectable against one, protectable against all. Any business in Washington including the term “custom RV interiors” in their title could be subject to injunction and damages. Moreover, any company merely conducting business in Washington could be liable under Custom Auto’s theory. For instance, an out of state company participating in a trade show in Washington or directing their business, through the internet, to Washington residents could be liable by using the term

“custom RV interiors” in their name.¹

Nor does the issue on appeal involve Custom Auto’s claims of foul play by disloyal sons which they attempt to spin. Questions of genericness and lack of secondary meaning have nothing to do with Custom Auto’s attempt to spin a yarn of treachery. Beyond this, the record shows, and Dave & LJ’s will show at a trial on the merits in the future, is that Larry V. Ast (“Ast Sr.”) of Cusom Auto essentially defrauded his sons out of years of work and investment and attempted to squash a new competitor by burying them in a lawsuit. Having for years strung his sons along with promises of selling the business to them in the future, to prevent them from leaving, and inducing them to forgo remuneration and even inducing Larry J. Ast (“LJ”) to mortgage his home to rescue the family business, Ast Sr. now tries to paint his sons as backstabbers to prevent them from succeeding on their own. The Court should reject Custom Auto’s spin and focus on the issues at hand – the law of trademarks and trade names in Washington.

B. PLAINTIFF MISSTATES THE RECORD

On page 1 of their brief, Plaintiff states that it is “in the business of providing interior remodeling and *exterior modifications* to recreational

¹ Custom Auto claims to have a national, and even international, market. It cannot argue, therefore, that this ruling impacts only businesses physically located in Washington.

vehicles.” (Emphasis added.) There is no record cite because this is not in the record. Custom Auto has, from the beginning, maintained their business is interior remodeling. They have never referred to “exterior modifications”. See CP 15 ll. 1-2, Decl. Larry V. Ast. (Plaintiff “provides and installs all manner of interior features for recreational vehicles.”). This revisionism is an effort to avoid Custom Auto’s admission of genericness in their Motion for Preliminary Injunction where they stated, “*Just as that name implies*, the corporation [Plaintiff] provides and installs all manner of interior features for recreational vehicles.” CP 5, ll. 20-21. The record supports the conclusion that Plaintiff’s name is generic; that Plaintiff did not present any real evidence of secondary meaning; and that the trial court relied on the “Inc” moniker to find Plaintiff’s name protectable. The trial court’s Order is thus unsupportable on the record.

C. PLAINTIFF’S ADMISSIONS MAKE DEFENDANT’S CASE.

Plaintiff effectively admits the trial court erred by ruling that adding “Inc” rendered their name protectable. Plaintiff admits that the trial court erred in finding that Plaintiff’s name had been registered for fifteen years---the very first and primary fact the trial court made.

The trial court clearly relied on the addition of “Inc.” to Plaintiff’s name to find it protectable though Plaintiff pretends the trial court’s emphasis was something else entirely. The trial court’s statement

demonstrates Plaintiff's name was considered generic by the court but only found protectable due to the addition of "Inc" such that Plaintiff "held itself out to be a business." Plaintiff tries to dodge this fact, but this error contaminated trial court's findings and its ultimate conclusions.

D. DEFENDANTS ASSIGNED ERROR TO THE FINDINGS.

Plaintiff incorrectly claims Defendant did not challenge the finding that Defendant's elected to appropriate Plaintiff's trade name and its alleged associated goodwill. Defendants specifically challenged that Plaintiff had not protectable trade name and therefore did not misappropriate goodwill. Defendants disputed, both in their Petition for Discretionary Review and in their Appellant Brief, the trial court's determination that they "elected to appropriate Plaintiff's trade name and associated good will"; that their trade name "engendered confusion" and that they intended to cause confusion. Plaintiff's argument that Defendants did not place those findings before this Court for review is disingenuous.

E. A COMBINATION OF GENERIC TERMS, USED IN THEIR ORDINARY MEANING, IS STILL GENERIC.

Plaintiff misstates Defendants position at page 15 of their Brief. Defendant never argued Plaintiff's name is generic simply because the individual words are generic, but consistently argued, instead, that a combination of generic terms, used in their ordinary meaning, is still

generic when considered as a whole. *Brief of the Appellant at 23-4*. Cases cited by Plaintiff reiterated that **a combination of generic terms will be generic if “the entire formulation does not add any meaning to the otherwise generic mark”**. In re Steelbuildings.com, 415 F.3d 1293, 1297 (Fed. Cir. 1997) (omitting citations). This is not the case of using a normal word outside of its normal meaning, like “Apple™” for computers. Plaintiff has provided no explanation of a distinctive new meaning of the gist of this phrase when viewed as a whole. Surgicenters of America, Inc., v. Med. Dental Surgeries Co., 601 F.2d 1011, 1014-19 (9th Cir. 1979) (“SURGICENTERS” is merely an abbreviation of “surgical” and “centers” used in their ordinary meaning); Application of Sun Oil Co., 426 F.2d 401, 403 (C.C.P.A. 1970) (“Custom Blended” for gasoline is generic where “custom” and “blended” are used in their ordinary meaning); Blinded Veterans Ass’n v. Blinded American Veterans Fndtn, 872 F.2d 1035, 1041-42 (D.C. Cir. 1989) (based on plain meaning of the words “blinded” and “veteran,” the phrase “Blinded Veterans” is generic for an association of once-sighted persons who served in the military); CES Publ’g Corp. v. St. Regis Publ’ns, Inc., 531 F.2d 11 (2nd Cir. 1975) (“Consumer Electronics” is generic for electronic equipment purchased and installed by consumers and, therefore, “Consumer Electronics Monthly is generic as a mark for a magazine title”); Nartron Corp. v.

STMicroelectronics, Inc., 305 F.3d 397 (6th Cir. 2002) ("smart power" is generic even though term had been registered as trademark and had become incontestable, because as used in semiconductor industry it described type of technology).

Here, none of the generic individual words is altered in meaning or ordinary usage when taken as a whole so the combination remains generic. "We do not believe that the principle that the validity of a mark is to be determined by looking at the mark as a whole precludes a court from examining the meanings of the component parts in determining the meaning as a whole." 2 MCCARTHY § 12:39 at 12-128, quoting Liquid Controls Corp. v. Liquid Control Corp., 802 F.2d 934 (7th Cir. 1986). "Where individually generic words are combined into a compound word (e.g. 'screenwipe'), the compound word may be found to be generic if evidence shows that the joining of the words lends no additional meaning to the term." 2 MCCARTHY § 12:39 at 12-129 (footnotes omitted) (citing In re Gould Paper Corp., 483 F.2d 1017 (Fed. Cir. 1987) which found "screenwipe" generic composite name for an anti-static cloth for cleaning computer and television screens).

Plaintiff erroneously relies on cases such as California Cooler, Inc. v. Loretto Winery, Ltd., 774 F.2d 1451 (9th Cir. 1985), and Committee for Idaho's High Desert, Inc., v. Yost, 92 F.3d 814 (9th Cir. 1996). Most

notably for both of these cases: (1) the marks were determined to be *geographically* descriptive, not generic, and thus needing proof of secondary meaning to be protectable; and (2) there was *overwhelming* proof of secondary meaning including extensive consumer surveys and testimony from disinterested witnesses such as reporters, state senators, and others. Here, “custom RV interiors” has no geographic predicate, and Plaintiff put on no evidence of secondary meaning.

The case of California Cooler, Inc. v. Loretto Winery, Ltd., 774 F.2d 1451 (9th Cir. 1985), cited by Plaintiff, illustrates what Plaintiff’s name is not. In that case the court found that while “Wine Cooler” was likely generic, the combination “*California Cooler*” when viewed as a whole was *geographically descriptive*. California Cooler, 774 F.2d at 1454-5. The court explained that “California Cooler” is a composite mark – a combination of geographically descriptive term and a generic term, which can become distinctive with significant proof of secondary meaning like other descriptive terms². California Cooler, 774 F.2d at 1455. “Wine Cooler” was understood by the consuming public as a type of beverage – a

² And California Cooler did provide strong evidence. “A survey of evidence submitted by California Cooler demonstrated that 75 percent of the persons questioned volunteered “California Cooler” as a brand of wine cooler.” Id., 774 F.2d at 1456. Additionally, California Cooler provided evidence of substantial sales and advertising. “Its sales increased from 150,000 cases in 1982 to 3,600,000 in the first six months of 1984. It grossed more than \$38,000,000 during that time and spent \$9,000,000 on advertising

product; “California Cooler” was understood as a beverage produced by the plaintiff located in California. California Cooler, 774 F.2d at 1455.

Similarly in “Committee for Idaho’s High Desert” is descriptive rather than generic when considered as a whole. *See* Committee for Idaho’s High Desert, Inc. v. Yost, 92 F.3d 814 (9th Cir. 1996). The term “Committee for” is generic. The term “Idaho’s High Desert” is also generic – it is simply a place. However, the combination “Committee for Idaho’s High Desert” considered as a whole is descriptive rather than generic because it identifies a specific entity, i.e. a group focused on issues related to the geographic area known as the Idaho High Desert. The Committee does not produce Idaho High Deserts. They don’t install Idaho High Deserts. They merely advocate for issues *relating to* Idaho’s High Desert. It is descriptive, not generic. Moreover, other groups would be free to use the terms in other descriptive ways: Committee for the Preservation of Idaho’s High Desert; Committee for Development of Idaho’s High Desert; Idaho’s High Desert Trails Committee – any of these would be legitimate as no group can exclude others from truthfully using a geographic place name to identify their product. John Vittucci, 130 Wn 483, 487, 228 P. at 292.

during the first nine and one-half months of 1984.” Id., 774 F.2d at 1452. Where is Plaintiff’s evidence in this case?

Here, Plaintiff's name appends no geographic or other descriptor to transform it into a composite mark. Ironically, the California Cooler and Committee for Idaho's High Desert cases demonstrate that it is Defendants' name that, when viewed as a whole, would be found descriptive and protectable – but only, of course, upon a showing of secondary meaning. “Custom RV Interiors” is generic, but “*Dave & LJ's* Custom RV Interiors” is descriptive as a whole.

F. PLAINTIFF'S GENUS-SPECIES EXPLANATION DEFIES COMMON ENGLISH.

Plaintiff argues that because it uses the term as its trade name it therefore denotes a source and not simply a product or service, and therefore it can't be generic. This is circular. The proper test is whether consumers in the relevant market actually identify the term “custom RV interiors” as a product or service, or as Plaintiff's business. *Brief of Appellant at 39-42.* Plaintiff's play word games with the “who you are/what you art” test that renders any generic term protectable so long as a plaintiff “held themselves out as a business.”

Plaintiff's own suggested alternatives prove the genericness of its name. Plaintiff argues that using “Dave & LJ's Custom *Made* RV Interiors of *Woodland*” would be fine. *Respondent's Brief at 16* (emphasis added). “Custom Made RV Interiors” is just as generic as “Custom RV

Interiors”. Just as “custom made furniture” is a generic tautology for “custom furniture.” Adding “Dave & LJ’s” and/or “of Woodland” to the generic phrases is what makes Plaintiff’s proposed alternative descriptive, which is why “Dave & LJ’s Custom RV Interiors” is descriptive (and potentially protectable as a whole) but “Custom RV Interiors,” without more, is merely generic. Dave & LJ’s could not (and does not seek to) prevent others from using the term “custom RV interiors” in their names.

What Plaintiff provides is “custom RV interiors.” What Defendants provide is “custom RV interiors.” What other “recreational vehicle [RV] remodelers” provide are “custom RV interiors.” The answer to the question of “who Defendants are” is “Dave & LJ’s,” so that the combination “Dave & LJ’s Custom RV Interiors” denotes a clearly distinguishable source of goods and services (just as “Dave & LJ’s Grocery Store” or “Dave & LJ’s Brake Repairs” or “Dave & LJ’s Bookstore”, etc.) The bare moniker “Custom RV Interiors” is no more distinguishing than “Grocery Store” or “Brake Repairs” or “Bookstore.” Plaintiff’s attempt at word games is unsupportable and circular. If a consumer asked, “What does your business do?” and the response was, “We provide custom RV interiors”, then the consumer would clearly understand what the service is. Or in another context, a consumer might say, “Boy, custom RV interiors sure are expensive, but they’re still worth

the money.” It is plain English. Conversely, no one would respond to the question “What does your group do?” with the statement, “We provide committee for Idaho’s high deserts.” Plaintiff cannot deny the public marketplace use of the very words which describe their products or services.

G. PLAINTIFF’S SYNONYM ARGUMENTS MISS THE POINT.

Plaintiff continues to argue, against black letter law, that so long as there is a (more wordy) synonym or definition that also refers to the goods or services then their generic name is somehow not generic. "The existence of synonyms for a term does not mean the term is not generic. There may be more than one term which the consuming public understands as designating a category of goods." Loctite, 516 F.Supp. at 201 ("Super Glue," "Instant Glue," and "Ten Second Glue" are all generic). *See also* Blinded Veterans Ass'n v. Blinded American Veterans Foundation, 872 F.2d 1035, 1041 (D.C.Cir.1989) ("A term need not be the sole designation of an article in order to be generic"); Convenient Food Mart, Inc. v. 6-Twelve Convenient Mart, Inc., 690 F.Supp.1457, 1462 (D.Md. 1988), *aff'd per curiam* 870 F.2d 654 (4th Cir. 1989).

Plaintiff plays word games by describing the genus of services as “installation of interior recreational vehicle furnishings.” *See Response at 13*. The fact that a definition of a term is wordy does not make the term

itself not generic. Any genus of goods or services could be defined by more than a single combination of words, but that is not the point³. The relevant issue is that Plaintiff's asserted trade name describes the genus of services that Plaintiff – and its competitors – provide to consumers. Alternative descriptions are irrelevant. Blinded Veterans Ass'n, 872 F.2d at 1041; Loctite, 516 F.Supp. at 201. “There is usually no one, single and exclusive generic name for a product. Any product may have many generic designations. Any one of these is incapable of trademark significance.” 2 MCCARTHY § 12:9. “[T]he time honored test for genericness articulated by Judge Learned Hand [is]: ‘**What do the buyers understand by the word for whose use the parties are contending?**’” Committee for Idaho's High Dessert, 92 F.3d at 821 (quoting Magic Wand, Inc. v. RDB, Inc., 940 F.2d at 640) (emphasis added).

Plaintiff's citation to Duraco Products, Inc. v. Joy Plastics Enterprises, Ltd., 40 F.3d 1431 (3d Cir. 1994) demonstrates fundamentally flaws in Plaintiff's argument. Duraco addressed a *trade dress* claim relating to product configuration, where the theory of depletion arises under the requirement that functional aspects of trade dress or product

³ “Interior design” could be called “the design and arrangement of interior furnishings, finishes, space arrangements, and accoutrements.” This does not somehow render “interior design” as not generic. The fact that Plaintiff can

configuration are not protectable. Id. at 1440-1. The Duraco court explicitly distinguished this trade dress functionality/depletion issue from the test for genericness under trademark law. Id. (“trademark taxonomy...does not fit the quite different considerations applicable to product configurations.”). Duraco is completely inapposite.

H. PLAINTIFF STILL CONTRADICTS BLACK LETTER LAW.

Plaintiff continues to rely on Electric Supply Co. v. Hess, 139 Wn.2d (1926) to argue that Washington protects generic trademarks and trade names. Defendants in their Brief have already discussed at length that: (1) Electric Supply is obsolete in light of modern statutes and precedent, in that generic terms are not protectable under the Lanham Act; (2) Washington statute explicitly requires Washington trademark law to be interpreted consistently with the Lanham Act (RCW 19.77.930); and, (3) trade names are evaluated under the same standards and precedent as trademarks in Washington, *see* Seattle Endeavors v. Maestro, 123 Wn.2d 339, 868 P.2d 120 (1994). Whatever the law in 1926, in 2007 in states that rule consistently with the decisions interpreting the Lanham Act, the law is clear: generic tradenames are not protectable.

Plaintiff's attempt to argue that the ruling in John Vittucci Co. v.

produce an awkwardly worded phrase also describing the genus of goods does not have any bearing on the genericness of their own name.

Merline, 130 Wn. 483, 228 P. 292 (1924) does not declare generic names unprotectable is simply bizarre. The Washington Supreme Court upheld the trial court on every issue. One of the trial court's conclusions was that the term "Virgin olive oil" was generic and therefore unprotectable. The Supreme Court upheld this conclusion stating: "It is indisputably shown, also, that Virgin olive oil simply means pure olive oil, and is a **generic** and descriptive term." John Vittucci, 130 Wn. at 487, 228 P. at 294. And later:

"No one can claim protection for the exclusive use of a *trade-mark or trade-name* which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection."

Id., 130 Wn. at 488-9, 228 P. at 294 (emphasis added) (omitting citations).

Plaintiff's continued argument that Seattle Endeavors does not hold that generic terms are unprotectable is equally bizarre⁴. Plaintiff cites Seattle Endeavors for the proposition that "Generic and descriptive terms are considered 'weak' because they are less distinctive." *Respondent's*

⁴ If Seattle Endeavors did not state explicitly that Electric Supply is overruled it is most likely because it did not come up, as the comment Plaintiff extracts from Electric Supply has not been the law for a long, long, long time in Washington – in fact, never. See Canal Co. v. Clark, *supra*, an 1871 case.

Brief at p. 11. This is a clear misstatement of the case. Seattle Endeavors, *id.* at 344-45, 868 P.2d at 124-5. Seattle Endeavors does *not* say “generic” marks are weak.

The issue is not merely academic in the present case because here Plaintiff’s entire case rests on the presumption that a generic trade name can be protected, so long as “Plaintiff is holding itself out to be a defined business entity.” Plaintiff’s intent matters not a wit.

Plaintiff cites a discredited New Hampshire decision, Auto Body Specialists which has subsequently been characterized as an “aberrant”. 2 MCCARTHY § 12:46:

State courts in Oregon and New Hampshire [citing the *Auto Body Specialists* case] appear to have adopted the **aberrant view** that even a "generic name" is protectable upon proof of "secondary meaning." But because **this view does violence** to the whole logic and policy of what the legal category of "generic name" denotes, **it is outside the mainstream of trademark law**. Some other courts have made comments which sound like they would consider affording some kind of protection to generic names... Mere usage, advertising and repetition alone cannot give trademark significance to a particular designation. **It is not effort, but results in the minds of customers that creates trademark rights**. As the court stated in holding CELLOPHANE unprotectable and generic: ‘It therefore makes no difference what efforts or money the DuPont Company expended in order to persuade the public that "cellophane" means an article of DuPont manufacture. So far as it did not succeed in actually converting the world to its gospel it can have no relief.’

2 MCCARTHY § 12:46. See also Weiss Noodle Co. v. Golden Cracknel and Specialty Co., 290 F.2d 845 (1961) (“[M]erchants act at their peril in attempting, by advertising, to convert [generic] names, which belong to the public, to their own exclusive use.”)

I. PLAINTIFF’S NAME IS GENERIC.

Plaintiff cites Longchamps, Inc. v. Eig, 315 F.Supp. 456 (S.D.N.Y. 1970) relating to the trademark “Steak & Brew.” Yet in that case, no one raised the issue that the mark was generic, but instead argued it was insufficiently descriptive. In Longchamps, the court specifically noted the substantial evidence of secondary meaning the trademark owner had put on in support of its admittedly weak mark. Id. at 458 (“[P]laintiff’s mark is, as defendant argues, a descriptive and weak mark.”) The evidence of secondary meaning was extensive, with 15 franchises opened and 5 more expected within the year, \$200,000 expended on advertising campaigns in newspapers, magazines and multiple broadcast media markets, and a demonstrated nexus between the advertising expenditures and commercial success with revenues increased to over \$10,000,000. Id., 457-8.

Compare this to the evidence proffered by Plaintiff: an email to David Ast sent to an email account that Plaintiff still apparently kept in use several months after David Ast was terminated; a call from a security vendor; and alleged calls from an unspecified number of unidentified

consumers asking if Larry J. Ast was an “owner” of the business run by Larry V. Ast where Plaintiff still had photographs of Larry J. Ast on its own website advertising themselves as a “family owned” business. No evidence of any widespread marketing efforts or even future plans. No evidence of multiple locations or franchisees. No evidence of advertising except a single sign at their place of business. No advertising on TV or radio (in fact Plaintiff has not advertised in those media for over a decade. Most importantly – Plaintiff provided no evidence of consumer perceptions whatsoever. Beyond that, consumers don’t purchase “steak & brews.” Consumers do purchase “custom RV interiors.”

Plaintiff also relies In re Steelbuilding.com, but this does not help them. In In re Steelbuilding, the Federal Circuit vacated the TTAB’s finding of genericness (the TTAB had the burden of proving genericness under the APA) but affirmed the refusal to register because the mark was “highly descriptive” thus requiring a very high level of proof of secondary meaning, which was not met. Steelbuilding, 415 F.3d at 1296. The Federal Circuit noted that the burden of proving secondary meaning “increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning” Id. at 1300. The applicant submitted significant amounts of proof, including evidence of print and internet advertising, declarations from competitors and applicant’s own

officers, sales data, web site traffic data, and customer communications, including an internet poll on name recognition (a consumer study). Id. at 1300. Still this was insufficient because the mark was so highly descriptive. Id. Here, the lower court did not require Plaintiff to present evidence of secondary meaning, but merely relied on the moniker “iñc” and time of use.

Plaintiff also submits the procedurally inapposite case, Schmidt v. Quigg, 609 F.Supp. 227 (E.D.Mich. 1985), which involved an appeal from a decision of the Trademark Trial and Appeals Board (TTAB) under the Administrative Procedure Act, 5 USC § 551 et seq, for denial of trademark registration. There, unlike here, the burden of proof lay with the defendant, the Patent and Trademark Office, as with any case brought under the APA, to establish that Schmidt’s trademark was generic and not descriptive, in the face of overwhelming evidence of secondary meaning. Schmidt, 609 F.Supp. at 229. The Trademark Office did not meet that burden---they cited a restaurant menu, but the menu listing “honey baked ham” could have been referring to the plaintiff’s own product, so was no proof at all. Conversely, the trademark owner presented consumer surveys from the relevant markets showing consumers identified the term “honey baked ham” as identifying the trademark owner’s brand – by a wide margin. Schmidt, 609 F. Supp. at 230-1 (scientific survey including 80

questions showing that 100% of consumers questioned recognized “honey baked hams” could only be obtained from the Honey Baked Ham Company). Additionally, the trademark owner submitted evidence of a significant national advertising campaign driving rapid growth. Schmidt, 609 F.Supp. at 231.

The present case is a sharp contrast to Schmidt. Here, the burden rests wholly on Plaintiff to prove both that “custom RV interiors” is not a generic term AND that if descriptive, there is a strong link in the minds of a significant number of consumers that they associate the term as Plaintiff’s business. Where is this evidence?

J. USE OF A GENERIC TERM USED BY ANOTHER IS NOT EVIDENCE OF SECONDARY MEANING.

Plaintiff continues to imply that by adopting the name “Dave & LJ’s Custom RV Interiors” this somehow proves secondary meaning. But such legitimate use does not prove Plaintiff has any rights. All competitors are free to use generic terms in their own names and trademarks – no one may appropriate such terms to the exclusion of others. “The first principal of unfair competition law is that everything that is not protected by an intellectual property right is free to copy.” 4 MCCARTHY § 23:122 (4th ed. 2007).⁵ Plaintiff’s argument is the same as

⁵ But what of Plaintiff’s registration of supplier’s names as trade names? Plaintiff went

arguing that adopting the name “Dave & LJ’s Groceries” proves that “groceries” is not generic. Or that “Dave & LJ’s Brake Repairs” proves that “brake repairs” is not generic. This argument is simply a regurgitation of Plaintiff’s argument that because they use “custom RV interiors” as their name then that proves it is not generic.

K. PLAINTIFF DID NOT PRODUCE EVIDENCE OF CONSUMER CONFUSION, OR EVEN LIKELY CONFUSION.

Plaintiff’s alleged evidence of “confusion” was thoroughly addressed previously. *See Brief of Appellant at 37-42.* Plaintiff’s “evidence” was scant and ambiguous at best. Moreover, it was Plaintiff’s burden to bear.

Plaintiff has never disputed that Dave & LJ’s use their own names to distinguish their business with consumers. Regarding whether consumer questions about LJ Ast’s ownership amount to actionable confusion, this is not mere “speculation.” *Plaintiff’s website* was advertising LJ Ast as part of their “family owned” business at the time consumers allegedly asked about LJ Ast’s ownership. *Plaintiff* still maintained an email account for David Ast long after his employment had been terminated.⁶ If there was

on a registration rampage, trying to lock up: “**Custom R.V. Interiors Incorporated,**” “**Custom R.V.,**” “**R.V. Interiors,**” “**Custom R.V. and Marine Interiors,**” “**My Flexsteel.com,**” “**Flexsteel RV Furniture.Com,**” “**Flexsteel Marine Furniture.Com.**”

⁶ The Court should also note that at the time Flexsteel allegedly asked Plaintiff to file a new credit application Plaintiff had just sold their business to a new owner, and most of the skilled employees had left. It is not surprising that Flexsteel wanted a newly

any confusion demonstrated by these incidents it was over the identities of individuals, not confusion over the names of the businesses. The burden rests with Plaintiff to provide evidence to overcome the obvious explanations for these incidents, not Defendants.⁷

Case law consistently directs courts to look to the consumer, not vendors when evaluating confusion. *See Brief of the Appellant at 37.* This is especially relevant in light of the fact that Plaintiff brought suit under the Consumer Protection Act. Where courts have found deliberate copying to be evidence supporting a likelihood of confusion they first determined that the plaintiffs had protectable marks. Confusion caused by the use of unprotectable generic terms, even if proven, is not actionable under any law. So, in fact, there is a reason for one person to use another person's trade name – the fact that the other person's trade name is a generic term denoting the goods or services in commerce and therefore free for all to use. Using that which is free for all to use is simply not evidence of secondary meaning, nor confusion, nor intent to confuse. This is exactly the reason why courts are required to determine the

submitted credit application for reasons wholly unrelated to trade name confusion. Again, it is Plaintiff's burden to present contrary evidence, not Defendants. Defendants have consistently argued that the trial court applied an incorrect evidentiary standard in this case.

⁷ The Court may also note that the vendor allegedly suggesting a name change encouraged Plaintiff to change their name not Defendants, as it is Plaintiff's name that is indistinct.

protectability of the asserted trade name first, before all else – to avoid such circular reasoning.

Plaintiff continues to make hay over a mis-directed email. But it doesn't indicate any confusion over a name. It just means that neither Defendants nor Plaintiff had updated their e-mail addresses at the time. The email, CP at 23, is addressed to "dave", not to Plaintiff. Obviously the sender typed in David Ast and had not updated their email address.

L. RISK OF CONFUSION IS PLAINTIFF'S FAULT AND DOES NOT SHIFT THE BURDEN TO OTHERS TO PROTECT PLAINTIFF'S GENERIC NAME.

Plaintiff continues to argue the incorrect contention that "trade names are subject to protection if a risk of public confusion exists." *Respondent's Brief at p. 11.* This is unsupportable. Where a business chooses an unprotectable name, they cannot then complain when competitors use it as well. *See Appellant's Brief at pp. 39-42* (Discussing PaperCuttter and Japan Telecom).

M. PLAINTIFF CONTINUES TO ARGUE THAT MERE USAGE CONOTES A RIGHT.

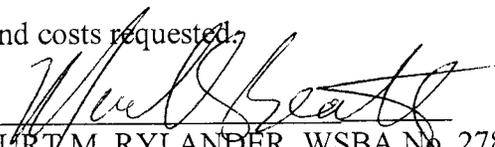
Plaintiff continues to argue, contrary to settled law, that mere length of use creates an inherent right to exclude others. If this were the standard then there would be no law of generic trademarks because whomever was the first to use would have all rights to the mark, whether

generic or not. *Accord*, Zebra Distributing Co., 75 Wn.2d 326, 450 P.2d 962 (1969) (denying protection to descriptive trademark where plaintiff failed to establish secondary meaning by clear evidence). Cases cited by Plaintiff give the lie to this reasoning. In Bayer Co. v. United Drug Co., 272 F.Supp. 505 (S.D.N.Y. 1921) (Judge Learned Hand), cited by Plaintiff, the court elucidated the principle that clearly arbitrary marks can actually become generic over time and thereby lose their protection. If a clearly valid mark can be rendered generic and unprotectable over time, then the mere usage of a term over a period of time cannot be held to transform a generic term into a descriptive name saturated with secondary meaning. Plaintiff cites no authority for its contention.

CONCLUSION

This Court should reverse the trial court, vacate the preliminary injunction, and award the fees and costs requested.

DATED 10/15/07


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STATE OF WASHINGTON
BY _____
DEPT. OF _____

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CUSTOM AUTO INTERIORS, INC.,
Plaintiff/Respondent,
-vs-
CUSTOM RV INTERIORS, INC., et al.,
Defendants/Appellants

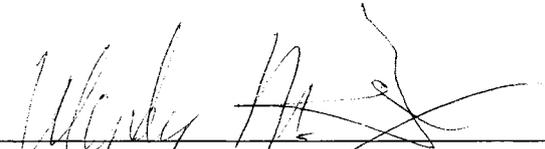
Court of Appeals No. 35869-7-II
Superior Court No. 06-2-06432-5

CERTIFICATE OF FILING BY MAIL UNDER RAP 18.6

I HEREBY CERTIFY under penalty of perjury of the laws of the State of Washington that on the date signed below I filed the following documents: Reply Brief of the Appellant, Certificate of Service, and this Certificate of Filing, by U.S. Express Overnight Mail, postage prepaid, during normal business hours, with the Court of Appeals of the State of Washington, Division II, address as follows:

Clerk of the Court, David Ponzoha
Washington State Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

DATED This 10/15/07.


WENDY M. FOX, Legal Assistant to
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Of Attorneys for Defendants

