

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BEST VACUUM, INC,)	DEFENDANT’S RESPONSE TO
)	PLAINTIFF’S LOCAL RULE 56.1
Plaintiff,)	STATEMENT OF UNDISPUTED
)	MATERIAL FACTS
v.)	
)	
IAN DESIGN, INC.)	JUDGE HART
)	
Defendant.)	Civil Action No. 04 C 2249

**DEFENDANT IAN DESIGN’S LOCAL RULE 56.1 RESPONSE TO
PLAINTIFF’S LOCAL RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL
FACTS**

NOW COMES Defendant IAN DESIGN, INC. (“Ian Design”) and respectfully submits its Local Rule 56.1 Response to Plaintiff Best Vacuum, Inc.’s (“Plaintiff”) Local Rule 56.1 Statement of Undisputed Material Facts. Additionally, Ian Design submits its Local Rule 56.1(b)(3)(B) Statement of Additional Material Facts (“Additional Material Facts”). Ian Design submits its 56.1 Response and Additional Material Facts in support of its opposition to Plaintiff’s motion for summary judgment and, at the same time, in support of Ian Design’s cross-motion for summary judgment.¹

¹ The Court will note that the accompanying memorandum filed by Ian Design both opposes Plaintiff’s motion for summary judgment and supports Ian Design’s cross-motion for summary judgment.

I. DEFENDANTS' LOCAL RULE 56.1(b)(3)(A) RESPONSE

1. Plaintiff, Best Vacuum, Inc., is an Illinois corporation that sells vacuum cleaners from its principal place of business in Chicago, Illinois and through the Internet. (Plaintiff's Complaint, ¶5.)

Response: Ian Design admits Plaintiff's Statement 1.

2. Defendant, Ian Design, Inc., is a Delaware corporation located in New Jersey that also sells vacuum cleaners through the Internet. (Def.'s Mem. in Supp. of Mot. Dismiss at 1.)

Response: Ian Design admits Plaintiff's Statement 2.

3. Since 1983, Best Vacuum has expended over \$1 Million in marketing the BEST VACUUM trademark. (Affidavit of P. Teven in Supp. of Mot. for Preliminary Inj., ¶7.)

Response: Ian Design denies Plaintiff's Statement 3 as it mischaracterizes the affidavit testimony of Paul Teven. Affidavit of Paul Teven (**Pl.'s Mot., Ex. 8**) ¶ 7.² For purposes of the Parties' motions for summary judgment only, Ian Design admits that Best Vacuum, Inc. expended over \$1,000,000 promoting the mark 'BEST VACUUM' *and* its website located at www.bestvacuum.com. Affidavit of Paul Teven (**Pl.'s Mot., Ex. 8**) ¶ 7.

4. Best Vacuum spends Sixty Thousand Dollars (\$60,000) per month on Internet advertising alone. (Aff. of P. Teven in Supp. of Mot. for Preliminary Inj., ¶8.)

² As Plaintiff filed all of its documents together, Ian Design refers to the collective document as Plaintiff's Motion ("Pl.'s Mot."). Exhibit numbers ("Ex. x") reference the specific exhibits attached and numbered in the collected document referred to as "Pl.'s Mot." Reference to paragraphs in the Plaintiff's Statement of Undisputed Material Facts ("Pl.'s SUMF") shall be specifically indicated (eg "Pl.'s SUMF ¶ 1"). Likewise, reference to specific pages in Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Pl.'s Mem. Supp. Summ. Judg.") shall be specifically indicated (eg "Pl.'s Mem. Supp. Summ. Judg., p. 1").

Response: For purposes of the Parties' motions for summary judgment only, Ian Design admits Plaintiff's Statement 4.

5. Plaintiff has advertised the mark "BEST VACUUM" and the Web site "bestvacuum.com" in the Chicago Tribune & Chicago Magazine. (Aff. of P. Teven in Supp. of Mot. for Preliminary Inj., ¶7, and Plaintiff's Group Exhibit A.)

Response: Ian Design admits Plaintiff's Statement 5, although Ian Design notes that the exhibits attached to Plaintiff's motion and memorandum are identified by numerical references.

6. Plaintiff advertises in the most heavily used Internet search engines and directories including Google & Overture. (Aff. of P. Teven in Supp. of Mot. for Preliminary Inj., ¶8.)

Response: For purposes of the Parties' motions for summary judgment only, Ian Design admits Plaintiff's Statement 6.

7. Best Vacuum currently sells eight (8) different brands of vacuum cleaner and is the leading United States distributor of Miele brand Vacuum Cleaners. (Complaint, ¶11.)

Response: With respect to Plaintiff's sale of eight (8) different brands of vacuum cleaners, Ian Design admits Plaintiff's Statement 7 for purposes of the Parties' motions for summary judgment only. In all other respects, Ian Design denies Plaintiff's Statement 7. Plaintiff has cited no evidence to support its statement. Pl.'s SUMF ¶ 7. Moreover, Paul Teven states that "Applicant is the [sic] currently a leading sales representative in

the United States for Miele brand vacuum cleaners.” Affidavit of Paul Teven (**Pl.’s Mot., Ex. 8**) ¶ 6. Consequently, while Plaintiff may be a leading sales representative for Miele brand vacuum cleaners, no evidence or support has been provided for the statement that Plaintiff is *the* leading distributor for Miele brand vacuum cleaners. Pl.’s SUMF ¶ 7. Finally, Ian Design contends that this is not a material issue of fact.

8. Plaintiff had gross sales of at least \$3,750,000 in the year 2004. (Aff. of P. Teven in Supp. of Mot. for Preliminary Inj., ¶10.)

Response: Ian Design denies Plaintiff’s Statement 8. Paul Teven executed the affidavit cited by Plaintiff on March 24, 2004. Affidavit of Paul Teven (**Pl.’s Mot., Ex. 8**). In the affidavit, Paul Teven stated that “Last year, Applicant’s gross sales through its Internet Web site were approximately \$3.75 million dollars.” Affidavit of Paul Teven (**Pl.’s Mot., Ex. 8**) ¶ 10. Presumably, Paul Teven referred to 2003 gross sales. Id. Additionally, gross sales approximated (which could fall either above or below) \$3.75 million dollars. Id.

9. Defendant registered the Internet domain names “bestvacuumcleaner.com” on November 6, 2003, and “bestchoicevacuums” on February 14, 2004. (Complaint, ¶11.)

Response: Ian Design admits Plaintiff’s Statement 9 to the extent that it registered the Internet domain name “bestvacuumcleaner.com” on November 6, 2003 and denies Plaintiff’s Statement 9 in all other respects. Ian Design registered “bestchoicevacuums.com” on February 15, 2004. Affidavit of John Roesler (“Roesler Aff.”) (**Exhibit 5**) ¶ 8.

10. Plaintiff solicited six (6) Customer Surveys in its store between January 6, 2006 and January 8th, 2006. (Exhibit B, Aff. of P. Teven Supp. of Mot. for Summ. Jdgt.)

Response: Ian Design objects to Plaintiff's Statement 10 and the "Customer Surveys" referenced to therein. As Plaintiff admits, the "Customer Surveys" were completed subsequent to the close of discovery and, consequently, were not produced in discovery. Prior to receiving a copy of Plaintiff's motion for summary judgment, Ian Design did not have opportunity to review the Plaintiff's "Customer Surveys." For these reasons, the Plaintiff's Statement 10 and the "Customer Surveys" should be stricken. Ian Design further notes that the affidavit of Paul Teven referred to in Plaintiff's Statement 10 and the accompanying "Customer Surveys" have been attached to the Plaintiff's motion as Exhibit 5, not Exhibit B.

Without waiving said objection to Plaintiff's Statement 10 and the "Customer Surveys," and for purposes of the Parties' motions for summary judgment only, Ian Design admits that Paul Teven submitted a single document entitled "Customer Survey" to six (6) of Plaintiff's customers while they were physically present before him in Plaintiff's store located at 2646 N. Lincoln Avenue, Chicago, Illinois during normal business hours between January 5-7, 2006. For purposes of the Parties' motions for summary judgment only, Ian Design further admits that it appears six (6) individuals each completed the document and returned it Paul Teven.

Ian Design expressly denies any affirmation regarding the validity of the “Customer Survey” and the questions therein posed to Plaintiff’s customers and again objects to their consideration by this Court.

11. Respondents to Plaintiff’s Customer Surveys have been aware of Plaintiff for periods ranging from one month to ten years. (Exhibit B.)

Response: Ian Design objects to Plaintiff’s Statement 11 and the “Customer Surveys” referenced to therein. As Plaintiff admits, the “Customer Surveys” were completed subsequent to the close of discovery and, consequently, were not produced in discovery. Prior to receiving a copy of Plaintiff’s motion for summary judgment, Ian Design did not have opportunity to review the Plaintiff’s “Customer Surveys.” For these reasons, the Plaintiff’s Statement 11 and the “Customer Surveys” should be stricken. Ian Design further notes that the affidavit of Paul Teven referred to in Plaintiff’s Statement 11 and the accompanying “Customer Surveys” have been attached to the Plaintiff’s motion as Exhibit 5, not Exhibit B.

Without waiving said objection to Plaintiff’s Statement 11 and the “Customer Surveys,” and for purposes of the Parties’ motions for summary judgment only, Ian Design admits that one respondent to the customer questionnaire attached as Exhibit 5 to Plaintiff’s Motion indicated having known of Plaintiff for one month and another customer indicated having known Plaintiff for “Ten+ years.”

Ian Design expressly denies any affirmation regarding the validity of the “Customer Survey” and the questions therein posed to Plaintiff’s customers and again objects to their consideration by this Court.

11. [Plaintiff’s Statement of Material Facts includes two paragraphs numbered 11; this represents the second of those paragraphs.] One of Plaintiff’s customers recalls seeing Plaintiff’s advertisement in Chicago Magazine. (Exhibit B, Customer Survey of Anne Edwards.).

Response: Ian Design objects to Plaintiff’s Second Statement 11 and the “Customer Surveys” referenced to therein. As Plaintiff admits, the “Customer Surveys” were completed subsequent to the close of discovery and, consequently, were not produced in discovery. Prior to receiving a copy of Plaintiff’s motion for summary judgment, Ian Design did not have opportunity to review the Plaintiff’s “Customer Surveys.” For these reasons, the Plaintiff’s Second Statement 11 and the “Customer Surveys” should be stricken. Ian Design further notes that the affidavit of Paul Teven referred to in Plaintiff’s Second Statement 11 and the accompanying “Customer Surveys” have been attached to the Plaintiff’s motion as Exhibit 5, not Exhibit B.

Without waiving said objection to Plaintiff’s Second Statement 11 and for purposes of the Parties’ motions for summary judgment only, Ian Design admits that one of Plaintiff’s customers named Anne Edwards responded that she saw an advertisement for Plaintiff in Chicago Magazine.

Ian Design expressly denies any affirmation regarding the validity of the “Customer Survey” and the questions therein posed to Plaintiff’s customers and again objects to their consideration by this Court.

12. Thirteen (13) Epinions.com customer reviews of Plaintiff and nine hundred twenty three (923) Epinions.com customer surveys about Plaintiff have been gathered online between November 13, 2003 and January 6, 2006. (Exhibit C.)

Response: Ian Design objects to Plaintiff’s Statement 12 and the “reviews” and “surveys” referenced to therein to the extent they include evidence that occurred subsequent to the close of discovery. On their face, it appears some of the “surveys” were completed subsequent to the close of discovery and, consequently, were not produced in discovery. For these reasons and to the extent they include evidence that occurred subsequent to the close of discovery, the Plaintiff’s Statement 12 and the “reviews” and “surveys” should be stricken. Ian Design further notes that the customer “reviews” and “surveys” referenced by Plaintiff have actually been attached as Exhibit 6 to Plaintiff’s Motion, not Exhibit C.

Without waiving said objection to Plaintiff’s Statement 12, Ian Design admits that thirteen (13) online reviews apparently submitted by Plaintiff’s customers have been attached to Plaintiff’s Motion. Without waiving said objection to Plaintiff’s Statement 12, Ian Design denies the Plaintiff’s Statement 12 in all other respects. The exhibit submitted by Plaintiff actually indicates that there exist nine hundred twenty-five (925)

customer surveys. Pl.'s Mot., Ex. 6. Additionally, of these 925 surveys of Plaintiff's own customers, Plaintiff has only submitted fifteen. Pl.'s Mot., Ex. 6. To the extent Plaintiff refers to customer responses not in evidence, Ian Design further objects to Plaintiff's Statement 12.

13. The number nine hundred twenty three (923) represents an increase of two hundred ninety seven (297) customer reviews since the Epinions.com reviews were first introduced by Plaintiff in support of its Motion for Preliminary Injunction. (Exhibit C.)

Response: Ian Design objects to Plaintiff's Statement 13 and the "reviews" and "surveys" referenced to therein to the extent they include evidence that occurred subsequent to the close of discovery. On their face, it appears some of the "surveys" were completed subsequent to the close of discovery and, consequently, were not produced in discovery. For these reasons and to the extent they include evidence that occurred subsequent to the close of discovery, the Plaintiff's Statement 13 and the "reviews" and "surveys" should be stricken. Ian Design further notes that the customer "reviews" and "surveys" referenced by Plaintiff have actually been attached as Exhibit 6 to Plaintiff's Motion, not Exhibit C.

Without waiving said objection to Plaintiff's Statement 13, Ian Design denies the allegations contained within Plaintiff's Statement 13. The number nine hundred twenty three (923) does not represent anything but its numerical value. More importantly, Exhibit 6 to Plaintiff's Motion actually indicates nine hundred twenty five surveys (925) of Plaintiff's customers. Pl.'s Motion, Ex. 6. Additionally, of these 925 surveys of

Plaintiff's own customers, Plaintiff has only submitted fifteen. Pl.'s Mot., Ex. 6. To the extent Plaintiff refers to customer responses not in evidence, Ian Design further objects to Plaintiff's Statement 12.

14. Consumers have been actually confused by Defendant's use of the Plaintiff's mark. (Exhibit D, Deposition of John Roesler, P. 28, Ln. 14.)

Response: Ian Design denies Plaintiff's Statement 14. The Plaintiff has submitted no evidence supporting its conclusory statement that any consumer confusion has arisen from Ian Design's use of the Plaintiff's mark. Pl.'s Mot.; Pl.'s SUMF. Further, the Plaintiff mischaracterizes the testimony of John Roesler. John Roesler testified that he had received a phone call from a consumer who was confused as to whether Ian Design was Plaintiff. Transcript of the Deposition of John Roesler ("Roesler Dep.") (**Exhibit 3**) 28:14-31:6. He further testified that he received a couple of phone calls from consumers who had confused Plaintiff with Ian Design and had, in fact, erroneously placed an order with Plaintiff. Roesler Dep. (**Exhibit 3**) 28:14-31:6. In response to Plaintiff's continued questioning, John Roesler testified:

" . . . I spoke to two customers who confused me with Best Vacuum, couple of customers who confused Best Vacuum with me and probably a dozen or so customers who confused me with other online retailers who sold Dyson vacuum who had entirely dissimilar names. So the closeness of the name didn't appear to have any relevance whatsoever."

Roesler Dep. (**Exhibit 3**) 31:25—32:7; see also Roesler Dep. (**Exhibit 3**) 48:20—49:15.

Apart from its mischaracterization of John Roesler's testimony, Plaintiff has no evidence of any actual confusion or likelihood of confusion. Pl.'s SUMF; Declaration of James D.

Kole (“Kole Decl.”) (**Exhibit 4**) ¶ 7. Ian Design finally notes that Plaintiff attached the Deposition of John Roesler to Plaintiff’s Motion as Exhibit 7, not Exhibit D.

II. UNDISPUTED MATERIAL FACTS (L.R. 56.1(a)(3))³

A. PARTIES

1. Best Vacuum, Inc. is an Illinois corporation with its principal place of business in Chicago, Illinois. Defendant's Answer and Affirmative Defenses ("Def.'s Answer") ¶ 5.

2. Ian Design, Inc. is a Delaware corporation with its principal place of business in the State of New Jersey. Supplemental Declaration of Charles Lee Mudd Jr. ("Mudd Supp. Decl.") (**Exhibit 2**) ¶ 2, Ex. A.

B. JURISDICTION and VENUE (L.R. 56.1(a)(3)(B))

3. The Plaintiff has alleged claims for trademark infringement, unfair competition, and trademark dilution pursuant to 15 U.S.C. §§ 1114, 1125(a) and (c), respectively. See generally Compl. As such, jurisdiction is based upon 15 U.S.C. § 1121(a); 28 U.S.C. § 1331; and, 28 U.S.C. § 1338. Compl. ¶ 2.

4. The Plaintiff has also alleged a claim for deceptive trade practices under 815 ILCS 510/2. The Court has supplemental jurisdiction over this claim pursuant to 28 U.S.C. § 1367. Compl. ¶ 2.

5. Venue is proper in this district under 28 U.S.C. § 1391(b) as a substantial part of the activities giving rise to the claims have allegedly occurred in this district.

Def.'s Answer ¶ 3.

³ As Plaintiff did not comply fully with Local Rule 56.1 in its Statement of Material Facts and as Ian Design does not wish to have such a deficiency affect its own cross-motion for summary judgment, Ian Design submits statements regarding the Parties and Jurisdiction.

III. DEFENDANTS' LOCAL RULE 56.1(b)(3)(B) STATEMENT OF ADDITIONAL MATERIAL FACTS⁴

A. OVERVIEW OF PARTIES

1. Although from different states, both Ian Design and Plaintiff sell vacuums and related products on the Internet. Complaint ¶¶ 5-6, 13-14; Def.'s Mem. in Opp. to Preliminary Injunction, p. 2; Roesler Dep. (**Exhibit 3**) 20:4—21:6; 43:18—44:2; 47:3-8.

2. Ian Design represents a small, start-up business. Kole Decl. (**Exhibit 4**) ¶ 2. Its business assets include approximately \$15,000 in inventory and a checking account with approximately \$3,000 - \$5,000. Roesler Dep. (**Exhibit 3**) 12:13-25.

3. Although Plaintiff sells many brands of vacuum and related products, Ian Design sells only Dyson vacuums. Compl. ¶ 11; Roesler Dep. (**Exhibit 3**) 20:4—21:6; 43:18—44:2.

4. Both Ian Design and Plaintiff sell Dyson vacuums on the Internet. Roesler Dep. (**Exhibit 3**) 47:3-8.

5. Ian Design sells Dyson vacuum cleaners. It believes Dyson vacuum cleaners to be the best vacuums or, at the minimum, the best vacuums it has used. Roesler Dep. (**Exhibit 3**) 44:3-7.

6. Ian Design seeks to sell its vacuum cleaners to those consumers looking for the best vacuum. Roesler Dep. (**Exhibit 3**) 44:8-15; and Kole Decl. (**Exhibit 4**) ¶ 2.

7. Neither Ian Design nor Plaintiff manufactures its own vacuum cleaners. Roesler Aff. (**Exhibit 5**) ¶ 4.

⁴ Ian Design submits its Additional Statement of Facts in opposition to Plaintiff's motion for summary judgment and in support of Ian Design's cross-motion for summary judgment.

B. IAN DESIGN'S DOMAIN NAMES AND INTENT

8. Ian Design registered the domain “bestvacuumcleaner.com” on November 6, 2003. Compl. ¶ 13; Def.’s Answer ¶ 13; Roesler Aff. (**Exhibit 5**) ¶ 5.

9. At the time Ian Design registered the domain “bestvacuumcleaner.com,” it had no knowledge of Best Vacuum, Inc. of Chicago, Illinois or www.bestvacuum.com. Roesler Dep. (**Exhibit 3**) 28:14-23; Roesler Aff. (**Exhibit 5**) ¶ 6; Kole Decl. (**Exhibit 4**) ¶¶ 3,5.

10. At the time Ian Design registered the domain “bestvacuumcleaner.com,” it had no intent to infringe any mark of Plaintiff or any other party. Roesler Dep. (**Exhibit 3**) 20:10—22:7; 23:15-20; 26:23—27:3-8; Roesler Aff. (**Exhibit 5**) ¶ 7. In fact, it chose “bestvacuumcleaner.com” for the express purpose of avoiding infringement of any party’s trademarks. Roesler Aff. (**Exhibit 5**) ¶ 7.

11. Ian Design stated explicitly on its website at “bestvacuumcleaner.com” that “bestvacuumcleaner.com is wholly owned and operated by Ian Design.” Roesler Dep. (**Exhibit 3**) ¶ 25:1—26:1.

12. Ian Design registered the domain “bestchoicevacuums.com” on February 15, 2004; Roesler Aff. (**Exhibit 5**) ¶ 8.

13. Ian Design registered the domain “bestchoicevacuums.com” in response to a communication from Plaintiff’s counsel that demanded that Ian Design cease using “bestvacuumcleaner.com.” Roesler Dep. (**Exhibit 3**) 27:15—28:3. Ian Design chose the name “bestchoicevacuums.com” because it had agreed to Plaintiff’s demand to cease use of “bestvacuumcleaners.com”. Roesler Dep. (**Exhibit 3**) 27:15—28:3.

14. Ian Design states explicitly on its website at “bestchoicevacuums.com” that “bestchoicevacuums.com is wholly owned and operated by Ian Design, Inc.” Compl. ¶ 13; Roesler Aff. (**Exhibit 5**) ¶ 9.

15. Shortly after obtaining the domain name “bestchoicevacuums.com,” Ian Design ceased using the domain “bestvacuumcleaner.com.” Roesler Dep. (**Exhibit 3**) 33:3-8; 37:2-9; Roesler Aff. (**Exhibit 5**) ¶ 10.

16. Ian Design has not used “bestvacuumcleaner.com” since 2004. Roesler Aff. (**Exhibit 5**) ¶ 11.

17. Ian Design did not adopt and/or register the domain names “bestvacuumcleaner.com” and “bestchoicevacuums.com” to trade on the alleged fame and goodwill associated with Plaintiff’s use of the term “best vacuum.” Roesler Dep. (**Exhibit 3**) 20:10—22:7; 23:15-20; 26:23—28:23; Roesler Aff. (**Exhibit 5**) ¶ 12.

18. Ian Design did not adopt and/or register the domain names “bestvacuumcleaner.com” and “bestchoicevacuums.com” to dilute Plaintiff’s alleged mark “best vacuum.” Roesler Dep. (**Exhibit 3**) 20:10—22:7; 23:15-20; 26:23—28:23; Roesler Aff. (**Exhibit 5**) ¶ 13.

19. Ian Design did not adopt and/or register the domain names “bestvacuumcleaner.com” and “bestchoicevacuums.com” to dilute the ability of Plaintiff to use “best vacuum” to identify and distinguish its products. Roesler Dep. (**Exhibit 3**) 20:10—22:7; 23:15-20; 26:23—28:23; Roesler Aff. (**Exhibit 5**) ¶ 14.

20. Ian Design did not adopt and/or register the domain names “bestvacuumcleaner.com” and “bestchoicevacuums.com” for purposes of causing

consumer confusion, mistake or deception. Roesler Dep. (**Exhibit 3**) 20:10—22:7; 23:15-20; 26:23—28:23; Roesler Aff. (**Exhibit 5**) ¶ 15.

21. Ian Design has not caused consumer confusion, mistake or deception. Roesler Dep. (**Exhibit 3**) 28:14; 30:22—31:6; 31:25—32:7; 48:20—49:15; Roesler Aff. (**Exhibit 5**) ¶ 16.

22. Ian Design has not used and does not use the domain names “bestvacuumcleaner.com” and “bestchoicevacuums.com” with any knowledge, intent and/or purpose of diluting any mark; diluting any ability of Plaintiff; causing consumer confusion, mistake or deception; and/or trading on any alleged fame or goodwill of Plaintiff in the term “best vacuum.” Roesler Dep. (**Exhibit 3**) 20:10—22:7; 23:15-20; 26:23—28:23; Roesler Aff. (**Exhibit 5**) ¶17.

23. Although Ian Design marketed its business with the purchase of “key word” advertising, it did not elect to or knowingly purchase the key word “best vacuum.” Roesler Dep. (**Exhibit 3**) 40:6—41:2; Roesler Aff. (**Exhibit 5**) ¶ 18.

24. Ian Design has never used “bestvacuum.com” or represented itself to be Best Vacuum, Inc. Roesler Aff. (**Exhibit 5**) ¶ 19. Ian Design has never represented itself to be affiliated with bestvacuum.com or Best Vacuum, Inc. Roesler Aff. (**Exhibit 5**) ¶ 20. Ian Design has no intention to ever use bestvacuum.com. Roesler Aff. (**Exhibit 5**) ¶ 21.

25. Ian Design never has had any intent to copy any marks of Plaintiff. Roesler Aff. (**Exhibit 5**) ¶ 22.

C. THE DESCRIPTIVE MARK “BEST VACUUM”

26. Plaintiff does not have a registered trademark in the term “best vacuum” and admits as much. Report and Recommendation of Magistrate Martin C. Ashman (Docs. ##29-30) at 4; Order of March 16, 2005 (Doc. #36); Pl.’s Mot. (Doc. #52), p. 8; Kole Decl. (**Exhibit 4**) ¶ 4, Ex.A.

27. “best vacuum” has been found to not be a generic term. Report and Recommendation of Magistrate Martin C. Ashman (Docs. ##29-30) at 6; Order of March 16, 2005 (Doc. #36).

28. Plaintiff has disclaimed the rights to the words “best” and “vacuum” apart from the manner in which they appear in the mark “best vacuum.” Kole Decl. (**Exhibit 4**) ¶ 4, Ex. A.

29. “best vacuum” is not a fanciful or arbitrary mark. Pl.’s Mot. (Doc. #52), p. 8.

30. “best vacuum” is a descriptive mark. Report and Recommendation of Magistrate Martin C. Ashman (Docs. ##29-30) at 6; Order of March 16, 2005 (Doc. #36); Pl.’s Mot. (Doc. #52), p. 8.

31. In an online survey of 300 Internet consumers administered independently by InsightExpress LLC (“Best Vacuum Survey”), the overwhelming majority (247 or 82.33%) of respondents identified the term “best vacuum” as meaning “a descriptive term used to describe the best vacuum cleaner.” In contrast, only 14 (or 4.67%) identified the term “best vacuum” as meaning a “retail store named ‘Best Vacuum,’” while 34 (or 11.33%) identified the term “best vacuum” as meaning the “Dyson brand of vacuum cleaner.” Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3-4, Exs. B and C “Best Vacuum Survey.”

32. Nearly all respondents to the Best Vacuum Survey (295 or 98.33%) were not familiar with “Best Vacuum” of the Internet domain www.bestvacuum.com. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3, 5, Exs. B and C “Best Vacuum Survey.”

33. Nearly all respondents to the Best Vacuum Survey (ninety-eight percent (98%) or 294) were not familiar with the store “Best Vacuum” in the State of Illinois. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3, 6, Exs. B and C “Best Vacuum Survey.”

34. Of the fourteen respondents to the Best Vacuum Survey who indicated they live in Illinois, only six live in the Chicagoland area. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3, 7, Exs. B and C “Best Vacuum Survey.”

35. Plaintiff has not obtained secondary meaning in the mark “best vacuum.” Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3-7, Exs. B and C “Best Vacuum Survey.”

36. Most people online have not heard of Best Vacuum, Inc. and do not associate the term “best vacuum” with Best Vacuum, Inc. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3-7, Exs. B and C “Best Vacuum Survey.”

37. Neither Best Vacuum, Inc. nor www.bestvacuum.com are well-known among Internet consumers. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3-7, Exs. B and C “Best Vacuum Survey.”

38. The general population does not associate the term “best vacuum” with Plaintiff or its website. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3-7, Exs. B and C “Best Vacuum Survey.”

39. “best vacuum” is not a recognized brand. Supp. Mudd Decl. (**Exhibit 2**) ¶¶ 3-7, Exs. B and C “Best Vacuum Survey.”

40. Many individuals and entities use the term “best vacuum” on the Internet. Declaration of Charles Lee Mudd Jr. (“Mudd. Decl.”) (**Exhibit 1**) ¶¶ 2-3, Exs. A—D; Roesler Aff. (**Exhibit 5**) ¶ 23; Kole Decl. (**Exhibit 4**) ¶ 6, Ex. C.

41. Plaintiff does not have exclusive use of “best vacuum” and has not used “best vacuum” exclusively. Mudd. Decl. (**Exhibit 1**) ¶¶ 2-3, Exs. A—D; Roesler Aff. (**Exhibit 5**) ¶ 23; Kole Decl. (**Exhibit 4**) ¶ 6, Ex. C.

42. Plaintiff’s alleged mark “best vacuum” is not famous. Supp. Mudd Decl. (**Exhibit 2**), ¶¶ 3-7, Exs. B and C “Best Vacuum Survey”; Mudd. Decl. (**Exhibit 1**) ¶¶ 2-3, Exs. A—D.

43. Plaintiff’s alleged mark “best vacuum” is not strong. Supp. Mudd Decl. (**Exhibit 2**), ¶¶ 3-7, Exs. B and C “Best Vacuum Survey”; Mudd. Decl. (**Exhibit 1**) ¶¶ 2-3, Exs. A—D; Kole Decl. (**Exhibit 4**) ¶ 6, Ex. C.

44. “bestchoicevacuums.com” is not confusingly similar to “bestvacuum.com.” Roesler Dep. (**Exhibit 3**) 47:9—49:15; Roesler Aff. (**Exhibit 5**) ¶ 24; Kole Decl. (**Exhibit 4**) ¶ 5, Ex. B.

45. “bestchoicevacuums.com” and “best vacuum” are not similar in appearance or sound. Roesler Dep. (**Exhibit 3**) 47:9—49:15; Roesler Aff. (**Exhibit 5**) ¶ 25; Kole Decl. (**Exhibit 4**) ¶ 5, Ex. B.

46. Ian Design’s use of the domain names “bestvacuumcleaner.com” and “bestchoicevacuums.com” is not likely to cause confusion, mistake or deception among consumers. Roesler Dep. (**Exhibit 3**) 47:9—49:15; Roesler Aff. (**Exhibit 5**) ¶¶ 24-25; Kole Decl. (**Exhibit 4**) ¶ 5, Ex. B.

D. DAMAGES

47. Plaintiff has not submitted any evidence or statements of material fact demonstrating it has suffered damages and/or has been harmed (irreparably or not) by Ian Design's use of the domains "bestvacuumcleaner.com" and "bestchoicevacuums.com." Plaintiff's SUMF ¶¶ 1-14.

48. Plaintiff has not submitted any evidence or statements of material fact as to how Ian Design's use of the domain names "bestvacuumcleaner.com" and "bestchoicevacuums.com" has negatively impacted the public interest. Plaintiff's SUMF ¶¶ 1-14.

Dated: Chicago, Illinois
February 22, 2006

Respectfully submitted,
DEFENDANT,
IAN DESIGN, INC.

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