

**DISPUTE RESOLUTION SERVICE**

**D00009189**

**Decision of Independent Expert**

Petmeds Limited

and

Amdega Brands Ltd

**1. The Parties:**

Complainant: Petmeds Limited  
Unit 23  
Angerstein Business Park  
Horn Lane  
London  
SE10 0RT  
United Kingdom

Respondent: Amdega Brands Ltd  
6 Knightsway, Hussey Road Battlefields Enterprise Park  
Shrewsbury  
Shropshire  
SY1 3TE  
United Kingdom

**2. The Domain Name**

ukpetmeds.co.uk ("the Disputed Domain Name")

**3. Procedural History**

The Complaint was filed with Nominet on 19 October 2010. Nominet validated the Complaint on the same day and notified the Respondent by post and by email. The Respondent filed a Response on 21 October 2010. Nominet notified the Complainant that it had until 28 October 2010 to file a Reply, and the Complainant did so on that day.

The Informal Mediation procedure failed to produce an acceptable solution for the parties and so on 10 January 2011 Nominet informed the Complainant that it had until 24 January 2011 to pay the fee for the decision of an Expert pursuant to paragraph 7 of the Nominet Dispute Resolution Service Policy ("the Policy"). On 12 January 2011 the Complainant paid Nominet the required fee.

On 13 January 2010 the undersigned, Jane Seager ("the Expert"), confirmed to Nominet that she knew of no reason why she could not properly accept the invitation to act as an Expert in this case and further confirmed that she knew of no matters which ought to be drawn to the attention of the parties which might appear to call into question her independence and/or impartiality.

#### **4. Factual Background**

The Complainant is a registered company incorporated on 25 January 2006. It sells veterinary products, including medication, food and accessories online, accessible via the website [www.petmeds.co.uk](http://www.petmeds.co.uk). Its domain name <petmeds.co.uk> was registered on 27 January 2003, and was presumably acquired by the Complainant around the time it started trading in 2006.

The Complainant currently does not own any registered trade marks in the term PETMEDS (or at least has not supplied any evidence of this).

The Disputed Domain Name was registered on 25 January 2010. It points towards a website operated by the Respondent, [www.ukpetmeds.co.uk](http://www.ukpetmeds.co.uk), offering similar veterinary products for sale online.

The Complainant's solicitors sent a cease and desist letter to the Respondent on 26 March 2010 and the Respondent replied on 19 April 2010. On 27 April 2010 the Complainant's solicitors sent a further three letters in response. The Respondent replied on 7 May 2010 and invited the Complainant to submit a Complaint to Nominet before 24 May 2010. On 1 June the Respondent wrote again to the Complainant saying that it believed the matter to be settled, given that there had been no response from the Complainant's solicitors.

#### **5. Parties' Contentions**

##### **Complaint**

##### **Complainant's Rights**

First, the Complainant asserts that all of the products on its website have been sold by reference to the Petmeds name, and every page of the website carries a prominent "Petmeds.co.uk" logo in the top right hand corner.

The Complainant points out that there are a large number of positive customer feedback reports on its website and lists various examples, such as "*will not hesitate to recommend Petmeds to friends*".

The Complainant goes on to underline that it has also received a considerable amount of attention in the national, regional and trade press, and attaches various extracts.

In addition, the Complainant states that in a search for the words "Petmeds" or "Pet Meds" on the major search engines (including Google, Yahoo!, Bing and Ask) its website is listed at the top (or nearly the top) position in both the natural and paid for search results.

The Complainant points out that it owns a number of other domain names which incorporate the Petmeds name, including <petmeds.at>, <petmeds.com.es>, <petmeds.de> and <petmeds.fr>. The Complainant states that it has been selling veterinary products under the Petmeds name since late 2009 in France, Spain, and

Germany through the websites [www.petmeds.fr](http://www.petmeds.fr), [www.petmeds.es](http://www.petmeds.es), and [www.petmeds.de](http://www.petmeds.de).

According to the Complainant, from the launch of the business to the end of February 2010, it has spent over £1 million developing, advertising and promoting its services and website under the Petmeds name. During this period, the Complainant has processed over 400,000 customer orders and has had over 3.5 million visits to its website. In terms of its sales volume and numbers of website hits, the Complainant asserts that it has grown into the largest online pet medications retailer in the United Kingdom.

As a result of its activities, the Complainant argues that it has built up a substantial reputation within the pet and veterinary medicine market under the Petmeds name. Customers in the pet and veterinary medicine market recognise the Petmeds name as being associated exclusively with the Complainant.

According to the Complainant it is therefore clear that it enjoys extensive rights in the Petmeds name. The Disputed Domain Name is almost identical to the Petmeds name, the only difference being the addition of the letters "UK" at the beginning. The Complainant points out that in the case of DRS6935 (<lemeridiendubai.co.uk>), the addition of a well known geographical location was held to be "*apt to designate a Le Meridien hotel in that location. That is how it would be seen and accordingly there is no difference in trade mark terms between the two*". In the Complainant's opinion the same reasoning should apply in this case and the addition of "UK" to the Petmeds name simply designates Petmeds in that location, and accordingly there is no difference in trade mark terms between the two.

### **Abusive Registration**

The Complainant says that it first became aware of the Respondent and its use of the Disputed Domain Name on 21 March 2010, when a customer of the Respondent mistakenly telephoned the Complainant in relation to an order it had placed with the Respondent. Upon investigation, the Complainant discovered (i) that the Disputed Domain Name was registered to the Respondent, (ii) that the Respondent's website contained several references to "Pet Meds" and (iii) that the Respondent's website also included a number of misleading statements, including a claim that the Respondent was the "*The No. 1 pet medications store*".

The Complainant instructed its solicitors immediately after becoming aware of the Respondent's activities and they sent a cease and desist letter to the Respondent setting out the Complainant's claim in passing off and abusive registration. In response the Respondent denied the Complainant's allegations and refused to transfer the Disputed Domain Name.

In an attempt to settle the dispute amicably, the Complainant wrote to the Respondent on a without prejudice basis to explore the possibility of a settlement, but the Respondent continued to refuse to transfer the Disputed Domain Name. All correspondence is attached in annex to the Complaint.

The Complainant highlights the definition of "Abusive Registration" in the Policy and refers to paragraphs 3(a)(i)(C) and 3(a)(ii) as being particularly relevant.

According to the Complainant, it is clear that it enjoyed extensive rights in the Petmeds name at the time the Disputed Domain Name was registered in January 2010. At that time the Complainant was the largest online pet medication retailer in the United Kingdom, both in terms of sales and numbers of hits on its website. The Complainant asserts that as a new entrant into the online pet medication retail market, it is inconceivable that the Respondent would not have been aware of the Complainant and

its rights in the Petmeds name. Thus in the Complainant's view the Respondent's registration of the Disputed Domain Name takes unfair advantage of, and is unfairly detrimental to, the Complainant's rights in the Petmeds name.

In addition, the Complainant asserts that the Respondent's registration and use of the Disputed Domain Name has confused (and is likely to further confuse) people or businesses into believing that the Disputed Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant, which it is not. Indeed the Complainant points out that it was through this confusion that the Complainant first became aware of the Respondent. Since that date the Complainant asserts that further instances of confusion have been picked up by the Complainant's call centre.

According to the Complainant, if has not done so already, this confusion will lead to diverted sales from the Complainant, thereby unfairly disrupting the Complainant's business in the UK.

Thus the Complainant asserts that the Respondent must have intended at to divert business from the Complainant or, at the least, must have known that it would benefit from the confusion arising as a result of its decision to use the Disputed Domain Name.

The Complainant argues that, given its clear prior rights to the Petmeds name, it is inconceivable that the Respondent could be in a position to demonstrate that the registration of the Disputed Domain Name is not an Abusive Registration, whether by establishing any of the circumstances set out at paragraph 4 of the Policy or otherwise. The Respondent is in direct competition with the Complainant and therefore could not possibly use the Disputed Domain Name in connection with a bona fide offering of goods or services. In the Complainant's view any active use of the Disputed Domain Name by the Respondent will inevitably take unfair advantage of, or be unfairly detrimental to, the Complainant's rights.

The Complainant therefore concludes that the Disputed Domain Name clearly constitutes an Abusive Registration and requests it to be transferred.

### **Response**

The Respondent asserts that it has done its utmost to respond to all of the correspondence from the Complainant with a full explanation of its position regarding the Disputed Domain Name (the relevant correspondence is attached to the Response). On 7 May 2010 it submitted a Response to the Complainant's original letter outlining its opinion that it had a legitimate claim to the Disputed Domain Name. It assumed that the matter was settled until it received notification of the Complaint almost five months later.

The Respondent argues that it has refused to transfer the Disputed Domain Name because it believes it has a legitimate claim to it. The Respondent points out that it invited the Complainant to submit the dispute to Nominet at it earliest opportunity but it did not do so.

The Respondent asserts that, as per its correspondence with the Complainant, at no time, either when registering or using the Disputed Domain Name, was the Disputed Domain Name intended as an Abusive Registration. The Respondent argues that its sole purpose in registering and using the Disputed Domain Name was to derive internet search visitors from high-traffic generic dictionary terms.

As far as the Complainant's statement about the likelihood of confusion is concerned, the Respondent states that it has already asked the Complainant to supply proof that customers have been confused so that it may investigate and take action. However, to date the Respondent asserts that it has heard nothing from the Complainant to support

its claims. In addition, the Respondent claims to be unaware of any customers who have been confused.

The Respondent states that it has never intended to divert business away from the Complainant and claims to be unaware that the Disputed Domain Name would cause confusion.

The Respondent expresses surprise that despite preparing responses to letters received from the Complainant inviting it to submit the dispute to Nominet it has had no reply. The Respondent thus states that it is of the opinion that the Complaint was brought in bad faith in an attempt at Reverse Domain Name Hijacking, namely to harass the Respondent as the genuine holder of the Disputed Domain Name.

### **Reply**

The Complainant asserts that the Respondent was in no place to demand that the Complainant submit its Complaint by 24 May 2010. Nor was the Respondent entitled to "consider the matter settled" when the Complainant did not file the Complaint by this date. In any event, the Complainant states that these matters are irrelevant to the Complaint.

An undated letter addressed to Nominet was attached to the Response. The Complainant states that neither it nor its solicitors had previously seen this letter. However, in the Complainant's opinion the Nominet letter and the Response raise certain matters which were not referred to in the Complaint and which require further comment by the Complainant. Those matters are as follows:

(i) The Respondent claims that the Disputed Domain Name is a generic name which describes its products/service.

The Complainant asserts that the "Petmeds" name is an unusual juxtaposition of two words (and an abbreviation of one), creating a unique, highly distinctive name, the extensive use of which by the Complainant is such that customers recognise it as being associated exclusively with the Complainant.

The Complainant argues that, for the reasons previously given in the Complaint, the addition of the geographical indicator simply designates Petmeds in the UK. In the Complainant's opinion, the Disputed Domain Name is not generic. Furthermore, in the Complainant's opinion, in light of the Complainant's rights in the Disputed Domain Name, the Respondent cannot be said to be making fair use of it and cannot come within paragraph 4(a)(ii) of the Policy.

(ii) The Respondent states that it registered the Disputed Domain Name in order to capitalise on search engine visitors using a combination of the words "UK", "Pet" and "Meds".

In the Complainant's opinion, by definition the Respondent must have been trying to capitalise on consumers searching for, inter alia, "Petmeds". This is the very essence of taking unfair advantage of the Complainant's rights in the Petmeds name, showing clearly that the Respondent is trying to divert business from the Complainant. The Complainant asserts that there are many other terms the Respondent could have used to describe its business, without adopting the Complainant's Petmeds name.

(iii) The Respondent claims that the use of the Disputed Domain Name is not unlawful under the Anticybersquatting Consumer Protection Act.

The Complainant points out that the Anticybersquatting Consumer Protection Act is a US enactment and is not relevant to the Complaint.

(iv) The Respondent claims that the Complaint was brought in bad faith and that the Complainant is attempting to assert the practice of Reverse Domain Name Hijacking.

The Nominet Dispute Resolution Service Procedure ("the Procedure") defines "Reverse Domain Name Hijacking" as "*using the DRS in bad faith in an attempt to deprive a Respondent of a Domain Name*". In the Complainant's opinion, the Respondent's claim in this regard is entirely without foundation. The Complaint (and the correspondence exchanged between the parties) sets out the Complainant's grounds clearly, demonstrating the Complainant's rights in the Petmeds name and its claim of abusive registration. The Complainant asserts that the Complaint has therefore quite clearly not been made in bad faith and states that the Respondent has no grounds for making such a claim.

(v) The Respondent refers to the Complainant's trade mark application, which is currently opposed.

In the Complainant's opinion this issue is irrelevant to the Complaint. In any event, the opposition was brought by a third party on the basis of a prior trade mark registration. The Complainant points out that it is currently in without prejudice negotiations with the third party in question, and expects the matter to be settled in the coming weeks.

## **6. Discussions and Findings**

### **General**

Under paragraph 2(a) of the Policy, for the Expert to order a transfer of the Disputed Domain Name the Complainant is required to demonstrate, on the balance of probabilities, both of the following elements:

- "(i) *The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and*
- "(ii) *The Domain Name, in the hands of the Respondent, is an Abusive Registration.*"

### **Complainant's Rights**

The Policy defines Rights as "*rights enforceable by the Complainant, whether under English law or otherwise*".

By far the easiest way to demonstrate Rights under the Policy is usually the provision of a registered trade mark. However in this regard the Complainant has supplied no evidence that it owns any registered trade marks in the term PETMEDS. It has made various trade mark applications, as referred to by the Respondent, but these do not grant the Complainant any Rights for the purposes of the Policy.

The Complainant is an incorporated company called Petmeds Limited. However, in this regard the Expert is of the opinion that the mere registration of a company name is not sufficient to create Rights under the Policy (and this is indeed the view of the majority of the Nominet Experts).

In some countries the mere registration of a domain name may be interpreted as a prior right, as can a trade name. However, as both parties are based in the UK it would seem

appropriate to limit consideration to rights enforceable under English law, despite the wider wording of the Policy.

In the light of the above, the only question that remains to be examined is whether the Complainant can lay claim to unregistered (or common law) trade mark rights in the term PETMEDS.

It is often remarked that the Nominet Dispute Resolution Service (DRS) is intended to be a fast, simple procedure designed predominantly for clear cut cases of Abusive Registration under the Policy (often referred to as "cybersquatting"). It is not intended to deal with complex points of law, which are better left to a court of competent jurisdiction. However, brief consideration of the law of passing off is somewhat unavoidable in these circumstances, as it is inextricably linked to the concept of unregistered trade mark rights.

Under the law of England and Wales, it is generally accepted that three elements must be satisfied for a successful action in passing off, as follows:

(i) First, the claimant has to prove that he has goodwill or reputation attached to the goods or services supplied, so that the identifying 'get-up' (whether brand name or trade description or the individual features of labelling or packaging) is recognised by the public as distinctive of those goods and services.

(ii) Secondly, the claimant must demonstrate a misrepresentation by the defendant to the public, leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant.

(iii) Finally, the claimant must prove that he has suffered damage by reason of the public's belief that the source of the defendant's goods or services is the same as the source of those offered by the claimant.

For the purposes of considering whether the Complainant has Rights under the Policy, the Expert is of the opinion that it is not necessary to come to a view on all three points listed, only point (i) (indeed points (ii) and (iii) relate more to the question of Abusive Registration, considered below).

As far as (i) is concerned, despite the Complainant's assertions to the contrary, there is clearly an issue in relation to distinctiveness. The Complainant is using the term PETMEDS to sell, amongst other things, medicine for animals, many of which are pets. In the Expert's opinion, the word "medicine" is frequently shortened to "meds" (in relation to both animal and human medicines) such that the phrase "pet meds" used in this context could be said to be relatively descriptive. This is illustrated by the results of the searches for "Pet Meds" or "Petmeds" using the major search engines (as evidenced by the Complainant), which demonstrate that the phrase is regularly used in a descriptive sense, for example "compare pet meds prices", "save on cheap pet meds", "find your best pet meds deal now", "pet meds for sale", "discount pet meds" and so on.

Having said this, it is not impossible to make out a case in relation to goodwill (as per (i) above) when the name used could be said to be descriptive, although if so the evidence required needs to be more substantial than for inherently distinctive terms. Traditionally the courts are very reluctant to grant what would effectively be a monopoly in descriptive words, as competitors need to be free to be able to describe their goods.

At this point however it is also worth underlining that the standard of distinctiveness required to make out a claim in passing off is lower than that which would be required for trade mark registration (*Phones4u Ltd v Phone4u.co.uk Internet Limited [2006] EWCA Civ 244*). In terms of the standard and quality of evidence required to demonstrate

unregistered trade mark rights, the Experts' Overview (available on the Nominet website) is helpful and states that:

*"If the right is an unregistered trade mark right, evidence needs to be put before the Expert to demonstrate the existence of the right. This will ordinarily include evidence to show that (a) the Complainant has used the name or mark in question for a not insignificant period and to a not insignificant degree (e.g. by way of sales figures, company accounts etc) and (b) the name or mark in question is recognised by the purchasing trade/public as indicating the goods or services of the Complainant (e.g. by way of advertisements and advertising and promotional expenditure, correspondence/orders/invoices from third parties and third party editorial matter such as press cuttings and search engine results)."*

The Complainant has supplied some of these types of evidence, but nevertheless the Expert finds it very difficult to come to a decision on whether this is enough, given the nature of the term at issue. In short, the question is whether the original primary meaning of PETMEDS has been displaced so that it has acquired a secondary meaning and become wholly associated with the Complainant and its goods.

In the Expert's opinion a finding on this point would require more in depth consideration of evidence than is possible (or desirable) as part of a Nominet DRS proceeding. For example, the Complainant has supplied press cuttings to illustrate its reputation, but there are only nine of them (some no more than a paragraph) and eight are from 2008. This is not to say that the Complainant has not supplied enough evidence (indeed the Experts' Overview advises against throwing in the "*kitchen-sink*"), but more that the DRS is perhaps not the correct forum for such a dispute.

At this point it would therefore be feasible to decline to find that the Complainant has Rights and fail the Complaint on that basis. However upon reflection the Expert has chosen not to do this. This is because overcoming the Rights hurdle under the Policy is often said to be a relatively low level test, more a question of establishing whether or not the Complainant has the standing to bring a complaint under the DRS.

Given that the Complainant has been trading under the "Petmeds" name since 2006 and appears to have built a substantial online business, the Expert is prepared to conclude that the Complainant has established Rights for the limited purpose of the DRS, although this is not to say that the Complainant would necessarily succeed in establishing the relevant goodwill for a case in passing off in a court of law.

Furthermore, the Policy stipulates that the name or mark in which the Complainant has Rights (PETMEDS) must be identical or similar to the Disputed Domain Name (ukpetmedsco.uk). It is accepted practice under the Policy to discount the ".co.uk" suffix, and so the only difference is the addition of the term "uk" in the Disputed Domain Name. In the Expert's opinion this difference is not significant enough to mean that the Complainant's name and the Disputed Domain Name are dissimilar to one another, especially in view of the fact that the Complainant also operates in the UK.

As a result the Expert finds that paragraph 2(a)(i) of the Policy is satisfied and that the Complainant has Rights in respect of a name which is similar to the Disputed Domain Name.

### **Abusive Registration**

Moving on to paragraph 2(a)(ii) of the Policy, Abusive Registration is defined in paragraph 1 of the Policy to mean a domain name which:



- "(i) *was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; or*
- (ii) *has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights."*

Paragraph 3(a) of the Policy sets out a non-exhaustive list of five factors which may be evidence of Abusive Registration. The Complainant seems to be basing its case mainly on paragraphs 3(a)(i)(C) and 3(a)(ii), which read as follows:

- "(i) *Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:*
  - (C) *for the purpose of unfairly disrupting the business of the Complainant.*
- (ii) *Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant"*

As far as paragraph 3(a)(i)(C) is concerned, the Expert is not satisfied that when the Respondent registered or acquired the Disputed Domain Name its primary intention was to unfairly disrupt the business of the Complainant. No evidence of any previous history between the parties has been presented to demonstrate that the Respondent may have actively intended to harm the Complainant's business upon registration of the Disputed Domain Name, even though the Complainant may nevertheless be faced with some disruption as a result. The Complainant has therefore failed to make out its case under this head of the Policy.

Paragraph 3(a)(ii) presents more difficulties. It is worth noting that, unlike paragraph 3(a)(i)(C), paragraph 3(a)(ii) does not depend upon the Respondent's intent and sets out a more objective test. As far as actual confusion is concerned, the Expert feels that it is not possible to make a finding on this based on the evidence presented. The Complainant simply mentions that there have been incidences of confusion picked up by its call centre, but does not elaborate. If the Complainant was attempting to prove its case in passing off, it would need to establish that such confusion affected a substantial part of the relevant public, or at least that it was greater than one or two isolated incidents. In the Expert's opinion the same is true under the DRS, and so a finding of actual confusion has not been made out, given the lack of concrete evidence on this point.

Turning to the likelihood of confusion, in the Expert's opinion the main stumbling block here is the rather descriptive nature of the Disputed Domain Name. If the Complainant was in possession of a very distinctive brand name and the Respondent had simply registered this as a domain name beginning with "uk", the Expert would have had no hesitation in finding a likelihood of confusion. Under these circumstances it is likely that a consideration of the corresponding websites would not even have been necessary, on the basis that driving a customer to another website using a confusing domain name is unfair (even if that other website leaves no room for any real confusion).

However, the situation here is clearly not as straightforward and requires an overall consideration of all the surrounding facts and evidence. Upon reflection the Expert finally declines to find that paragraph 3(a)(ii) is satisfied as a result of a combination of the following factors (in no particular order):

- The rather descriptive nature of the Disputed Domain Name itself. Upon brief investigation of some of the domain names referred to in the Respondent's Response (in accordance with paragraph 16(a) of the Procedure), the Expert is aware that there are literally hundreds of domain names and websites incorporating or using the term "Petmeds", some aimed at the UK market, others not. Some appear to be relatively small operations, but others are more significant. For example Petmed Express Inc appears to have been operating out of the US since 1996 and uses the main address [www.1800petmeds.com](http://www.1800petmeds.com), although it also uses various other domain names to point towards its website, such as <petmeds.com> and <petmeds-uk.com>.
- Paragraph 3(a)(ii) specifically requires people or business to be confused (or likely to be confused) that the Disputed Domain Name is connected to the Complainant and no-one else (and this would also be the case in relation to passing off). Given the above, the Expert is not convinced that any confusion (or likelihood of it) would necessarily always be with the Complainant itself.
- Anyone typing "Pet Meds" or "UK Pet Meds" (whether capitalised or not) into a search engine may not necessarily have the Complainant in mind and so if they are driven to the Respondent's website as a result this would not necessarily always be objectionable or unfair.
- The term "uk" appears before the term "petmeds" in the Disputed Domain Name, rather than after. It could thus be argued that the Disputed Domain Name gives the impression of referring generally to so-called "pet meds" in the UK, rather than the UK part of the Complainant's business (which would be more likely if the Disputed Domain Name was <petmedsuk.co.uk>).
- The Respondent appears to be actually trading under the name "UK Pet Meds". If the Respondent was conducting business under another name and was using the Disputed Domain Name simply to drive traffic to its website then the Complainant's case would certainly be stronger.
- The Respondent's website does appear to be a genuine competing website selling relevant products using a different colour scheme, logo etc. It is not merely a page containing pay per click links.

It should be noted here that the Expert is somewhat sceptical about the Respondent's assertions that it was not aware of the Complainant when it launched its business, given the Complainant's entirely credible claims to be the largest online pet medications retailer in the United Kingdom at that time. However, whilst a finding of Abusive Registration would be difficult if the Respondent genuinely had no knowledge of the Complainant, of itself knowledge does not automatically lead to such a finding, especially given the rather problematic nature of the Complainant's Rights and the fact that the Respondent may equally have had other third parties using the term "Petmeds" in mind.

None of the other factors listed in paragraph 3 of the Policy illustrating Abusive Registration can be said to be relevant, and the Complainant does not cite any of them in argument. The list is only meant to give illustrative examples, and so the Expert has considered whether there are any other arguments which could suggest that the Respondent's registration or use of the Disputed Domain Name was or is inherently unfair (and thus should be brought to an end by the DRS procedure), or whether such registration or use could simply be said to be an unfortunate consequence of the Complainant's initial choice of domain name. However given the circumstances of the case as a whole and, in particular, the nature of the Disputed Domain Name and the fact that the Complainant was only barely able to establish Rights in accordance with the Policy, the Expert declines to make a finding of Abusive Registration.

Paragraph 4(a) of the Policy contains a non-exhaustive list of factors which may be evidence that the Disputed Domain Name is not an Abusive Registration, but in the light of the above finding it is not necessary to consider such factors any further. It is for the Complainant to make out its case and not for the Respondent to prove otherwise.

In summary, the Expert has considered the admissibility, relevance, materiality and weight of the evidence as a whole and is not satisfied that the Complainant has succeeded in proving, on balance of probabilities, that the Disputed Domain Name is an Abusive Registration in accordance with paragraph 2(a)(ii) of the Policy.

The issues raised are complex and in the Expert's opinion the DRS procedure is designed predominantly for clear cut cases where it is evident that the domain name in question has only one rightful owner (as opposed to multiple parties potentially being able to lay credible claim to it). Domain names are registered on a first come first served basis and in this case the Expert is unwilling to overturn this. The parties are of course free to pursue the matter in a court of competent jurisdiction, and the Expert makes no inferences as to what the outcome of such a case would be.

### **Reverse Domain Name Hijacking**

Reverse Domain Name Hijacking is defined under paragraph 1 of the Procedure as using the DRS in bad faith in an attempt to deprive a Respondent of a domain name.

The Expert does not believe that the Complainant acted in bad faith. Indeed, given the facts of this case, the Expert's failure to find Abusive Registration was by no means a forgone conclusion. Reverse Domain Name Hijacking is therefore not found.

## **7. Decision**

The Expert finds that the Complainant has Rights in a name which is identical to the Disputed Domain Name, but is not satisfied that the Disputed Domain Name, in the hands of the Respondent, is an Abusive Registration. No action should therefore be taken in relation to the Disputed Domain Name.

The Expert declines to make a finding of Reverse Domain Name Hijacking against the Complainant.

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Jane Seager

10 February 2011