ADMINISTRATIVE PANEL DECISION

Kitchens To Go, LLC v. KTG.COM, Whoisguard Protected / HUKU LLC
Case No. D2017-2241

1. The Parties

The Complainant is Kitchens To Go, LLC of Naperville, Illinois, United States of America ("United States" or "US"), represented by Tressler LLP, United States.

The Respondent is KTG.COM, Whoisguard Protected of Kirkland, Washington, United States / HUKU LLC of Belize City, Belize, represented by Muscovitch Law P.C., Canada.

2. The Domain Name and Registrar

The disputed domain name <ktg.com> is registered with eNom, Inc. (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on November 13, 2017. On November 14, 2017, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 14, 2017, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to the Complainant on November 16, 2017 providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on November 21, 2017.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on November 27, 2017. In accordance with the Rules, paragraph 5, the due date for the Response was December 17, 2017. Upon request by the Respondent, the Response due date was automatically extended to December 21, 2018 in accordance with Rule 5(b). The Response was filed with the Center December 20, 2017. On January 12, 2018, the Complainant filed an unsolicited Supplemental Filing in reply to the Response. On January 15, 2018, the Respondent filed an unsolicited Supplemental Filing in response to the Complainant's Supplemental Filing.

The Center appointed Antony Gold, Ellen B Shankman, and Nick J. Gardner as panelists in this matter on January 23, 2018. The Panel finds that it was properly constituted. Each member of the Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is a supplier of mobile and modular kitchens for short term and long term temporary kitchen facilities, both in the USA and internationally. It has traded since, at least, July 2000 as (in whole or in part) KITCHENS TO GO and owns US trademark registration number 3,724,650 for the word mark KITCHENS TO GO, registered on December 15, 2009, in international class 43.

The Complainant also owns the domain name <k-t-g.com> which points to a website providing information about its products.

The disputed domain name was first registered on February 22, 2001. Prior to these proceedings, the details of the underlying registrant have been shielded by a privacy service. The disputed domain name has not pointed to a live website other than, from at least 2017, a webpage which indicates that it may be for sale.

In September 2017, the Complainant was approached by a firm of domain name brokers, acting on behalf of the registrant for the disputed domain name, soliciting offers to buy it. After various email exchanges, on October 3, 2017 the Complainant sent an email to the broker which asserted trademark rights in the disputed domain. It added that any use of “KTG” in commerce by another party constituted trademark infringement and said that the broker’s sale of the disputed domain name to any party other than the Complainant would constitute trademark infringement. The Complainant made an offer of USD 2,500 for the disputed domain name and indicated that, if it was not accepted, it would take the necessary action to transfer the disputed domain name to it. There was no response to this email.

5. The Parties’ Supplemental Filings

It is convenient to deal at this point with the parties’ Supplemental Filings.

The Rules and Supplemental Rules provide for service of a complaint and a response. There is no explicit provision for additional filings save in respect of further statements or documents which are provided in response to a request from the Panel (paragraph 12 of the Rules). Pursuant to paragraph 10 of the Rules, the Panel is obligated to “ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case” and to “conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and these Rules”.

The decision whether to accept supplemental filings is at the discretion of the panel, but is exercised sparingly. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“WIPO Overview 3.0”), section 4.6 and, in particular, the commentary that “[u]nsolicited supplemental filings are generally discouraged, unless specifically requested by the panel” and the comment that “panels have repeatedly affirmed that the party submitting or requesting to submit an unsolicited supplemental filing should clearly show its relevance to the case and why it was unable to provide the information contained therein in its complaint or response *(e.g.*, owing to some ‘exceptional’ circumstance)”.

The Respondent’s Response, filed on December 20, 2017, provided appreciably more information about the history of the disputed domain name, the circumstances of its current ownership and the context in which it had been offered for sale than had been available to the Complainant as at the date it filed its Amended Complaint. It was the Respondent’s disclosure of this additional information which led to the Supplemental

Filing by the Complainant on January 12, 2018. On January 15, 2018, the Respondent sought to answer these additional submissions by its own Supplemental Filing.

The Complainant could not possibly have known, at the time of filing its Amended Complaint, about the ownership history of the disputed domain name and the background to the Respondent's attempts to sell the disputed domain name, as disclosed in the Response. The Panel accepts that information of this nature is potentially pertinent to this case. In these circumstances, it is appropriate for the Panel to consider the Complainant's Supplemental Filing. As that, in turn, raises issues which the Respondent could not reasonably have anticipated when serving its Response, it is similarly appropriate for the Panel to consider the Respondent's Supplemental Filing.

5. Parties' Contentions

A. Complainant

In addition to its registered rights in KITCHENS TO GO, the Complainant asserts that, it has unregistered common law rights in the acronym KTG. It says that it has used this trading style since at least July 2000, that its use has been continuous, widespread and open and that it has invested significant time, money and effort to promote its goods and services using its KTG mark, both throughout the United States and internationally.

The Complainant provides evidence in support of these assertions which comprises the following. First, a brief declaration from an officer of the Complainant asserting that it has used the trademarks KITCHENS TO GO and KTG since at least 2000. Second, an undated photograph of one of its trucks which, it says, is branded KTG. Third, a page from its website, first posted in August 2015, which uses KTG to denote the company in the heading of an article and also at various points in a sidebar. Fourth, it provides a redacted letter to a prospective customer, dated January 2005, in which it refers to itself as KTG . Fifth, it provides a floor plan for a kitchen module, dated 2004, with a design drawing reference "KTG-078F"".

The Complainant says that the disputed domain name is identical and confusingly similar to its KTG trademark and to the domain name which points to its own website, namely <k-t-g.com>. It says that the fact that the disputed domain name is being offered for sale is causing confusion among its customers as to whether the Complainant is still in business. It adds that it has only brought this Complaint now because, prior to being approached by the Respondent's broker, the disputed domain name was not in use and was not being offered for sale to others.

The Complainant says that the Respondent has no rights or legitimate interests in the disputed domain name. There is no evidence that the Respondent has made demonstrable preparations to use the disputed domain name in commerce and that the Respondent acquired the disputed domain name in order to sell it. The Respondent has not been known by the disputed domain name and owns no trademark rights in KTG. Nor is there evidence that the Respondent is making a legitimate noncommercial or fair use of the disputed domain name. The Complainant says that it has established a *prima facie* case that the Respondent does not have rights or a legitimate interest in the disputed domain name and that the burden of showing to the contrary shifts to the Respondent.

The Complainant explains that in September 2017, it was approached by a domain name broker, appointed by the Respondent, soliciting offers for the disputed domain name. In the course of discussions, the broker indicated that the Respondent had recently turned down an offer of USD 20,000 from another party. The Complainant says an offer by the Respondent to sell the disputed domain name for valuable consideration in excess of its documented out-of-pocket costs directly related to it establishes that it was registered and is being used in bad faith.

Moreover, it says, earlier panel decisions have found that the passive holding of a domain name does not preclude a finding of bad faith. Panelists look at the totality of the circumstances including whether a respondent submitted a response or provided evidence of actual or contemplated good faith use, whether it took active steps to conceal its identity, the implausibility of any good faith use to which the domain name could be put and the distinctiveness of the complainant's mark. See, for example, *Telstra Corporation Limited v Nuclear Marshmallows*, WIPO Case No. D2000-0003.

Having regard to these criteria, the Complainant points out that the Respondent has masked its identity. In addition, it says that the Respondent's use of the arbitrary letters KTG is further evidence of bad faith and that no one would legitimately choose those letters unless it was either seeking to create an association with the Complainant or intending to sell the disputed domain name for an improper purpose to third parties or to the Complainant. Furthermore, the Respondent failed to respond to the Complainant's email offering to purchase the disputed domain name for USD 2,500.

Lastly, the Complainant produces details of approximately ninety domain names registered by the Respondent. It says that website searches for a random selection of these domain names, including <brewage.net>, <prospa.in>, and <722874.com> show them to be inactive, save for pointing to a website offering them for sale. The Complainant says that the list and the results of its searches establish that the Respondent is a cybersquatter, that is a person who registers or sells a domain name with the intention of profiting from the goodwill of another's trademark.

B. Respondent

The Respondent explains that, whilst the disputed domain name was first registered in 2001, HUKU LLC acquired the disputed domain name from an unrelated third party in November 2007. It asserts that this date should be treated as the effective date of registration for the purpose of the Complaint.

The director of HUKU LLC and the owner of its assets had been a Ricky Rajiv Behl. However, Mr. Behl, died in January 2017, bequeathing all the domain names he owned, through his interest in HUKU LLC, to his sister, Sarika Haggipavlou. Due to an administrative hiccup, the WhoIs details had not been updated to reflect the change in ownership. Accordingly, Mrs. Haggipavlou had not received the Complainant's demand letter and, in turn, the Complainant was unaware of her ownership of the disputed domain name. However, it has been Mrs. Haggipavlou who instructed domain name brokers to seek to sell the disputed domain name. The Respondent explains that Mrs. Haggipavlou also took over the existing privacy protection at the time that the disputed domain name was transferred to her.

The Respondent discloses a more extensive list of the domain names owned by HUKU LLC than that produced by the Complainant. It says that the list does not contain a single instance of any generally recognized brand name, let alone any famous or highly distinctive trademark. It comprises domain names corresponding to dictionary words, such as <teach.uk>, numerous domain names relating to the card game of gin rummy, such as <rummystars.com>, some domain names with no clear meaning, such as <588384.com>, as well as a number of three and four letter domain names. It says that Mrs. Haggipavlou is entitled to seek a market price in relation to each of the domain names she inherited.

A Google search establishes vast numbers of contexts in which "KTG" is used worldwide, including not only businesses and institutions but also as an airport code and the name of an enzyme. The Respondent provides screenshots of the websites of sixteen businesses or institutions which have KTG as the dominant component of their trading name and which use a domain name incorporating the letters KTG to point to their websites. The Respondent also provides evidence of forty three active or pending trademark registrations for KTG globally, including two US trademark registrations. It points out that neither of the US registrations belongs to the Complainant.

The Respondent summarises the discussions between the parties with regard to the possible sale of the disputed domain name and refers to the email sent by the Complainant on October 3, 2017, after the parties were unable to agree on price, in which the Complainant asserted that "any use of the KTG mark in commerce by another party constitutes trademark infringement" and that "[the Respondent's] sale of this domain name to others would constitute intentional trademark infringement". The Respondent says that

KTG can be lawfully used by numerous parties other than the Complainant and the Complainant's letter was a blatant effort to put undue pressure on the Respondent to sell the disputed domain name to it for USD 2,500, which was well beneath its market value.

The Respondent says that the disputed domain name is not identical or confusingly similar to a trademark in which the Respondent has rights. The Complainant's KITCHENS TO GO trademark is irrelevant to the proceedings; see *RG Golf, Inc. v. The Golf Warehouse, Inc*., NAF Claim No. FA1511001647486, where the panel found that held that there was no confusing similarity between the three-letter acronym, incorporated into the domain name <tgw.com>, and THE GOLF WAREHOUSE.

The Respondent says that, for the purpose of establishing common law trademark rights under the Policy, the Complainant must show that the public associates the asserted mark with the Complainant's goods or services. It draws attention to the guidance set out in the WIPO Overview 3.0 that "conclusory allegations of unregistered or common law rights … would not normally suffice to show secondary meaning".

The Respondent says that the Complainant has produced scant evidence in support of its contention that it has used its KTG trademark since at least July 2000. The undated photograph of the Complainant's truck does not support a claim that KTG has been used by it since 2000. Similarly, the screenshot of the Complainant's website actually shows that "KitchensToGo.com" is the Complainant's primary trading style and does not assist in demonstrating any recognition by the public of KTG as a trademark of the Complainant. Likewise, passing references to "KTG" in a 2005 letter to a customer and a reference coding of "KTG-078F" on a drawing do not provide any substantive support for the Complainant's assertion of common law trademark rights. The Respondent refers to *Koninklijke Nederlandse Springsstoffen Fabriek N.V. v. Kim Hyungho GMM*, WIPO Case No. D2002-0707 in which the panel held that, where an acronym is not a company name or trademark, the complainant will fail to prove trademark rights in that acronym, if it cannot demonstrate extensive use, to the extent that the complainant could be said to be generally known by that acronym. The Complainant's evidence, it says, falls a long way short of this threshold.

So far as the Respondent's rights or legitimate interests in the disputed domain name are concerned, the Respondent acknowledges that the specific motive of HUKU LLC in registering the disputed domain name is not known. However, it says that UDRP panels have ruled in favour of respondents who have registered domain names corresponding to three-letter acronyms which are widely used. The Respondent refers to *Philippe Tenenhaus v. Telepathy, Inc.,* NAF Claim No.94355, where the panel decided that the complainant did not have exclusive rights to the acronym DAF, as it was used by multiple other parties. It says that previous panels have found that the registration of two, three and four-letter domain names, even by domain name speculators, can constitute a "legitimate interest" as understood by the Policy; see *Automóviles de Luarca, S.A. v. NUCOM, Domain Name Brokers*, WIPO Case No. D2005-0282, which found that registration of a potentially valuable, four letter domain name by the respondent, which was of use to many "possible end users" was not a violation of the competing rights of all those parties who might have a discernible interest in that acronym. Moreover, it says, trading in inherently valuable domains can constitute use of the domain name in connection with a *bona fide* offering of goods and services; see *Allocation Network GmbH v. Steve Gregory*, WIPO Case No. D2000-0016, where the panel held that in principle, the practice of registering and selling descriptive, or generic domain names may constitute use of the domain name in connection with a genuine offering of goods or services.

The Respondent says that the Complainant's allegation of bad faith registration by HUKU LLC is misconceived. There is no evidence to support its assertion that HUKU LLC was deliberately targeting the Complainant, or was even aware of it, when it registered the disputed domain name, not least when the Complainant's alleged KTG trading style was not registered as a trademark and the existence of its alleged common law trademark rights in KTG is questionable. It says that the more likely explanation is that the disputed domain name was registered because three letter domain names have an intrinsic investment value. In this respect, the facts are similar to *De Lage Landen International B.V. v. Steve Thomas*, WIPO Case No. D2017-2045 where the panel said; "it seems fanciful in the extreme to suggest Respondent chose the Disputed Domain Name… because of any perceived connection with the Complainant, given there is no credible evidence suggesting why the Respondent should have been aware of the Complainant at all".

The Respondent says that if a respondent has established that it has a legitimate interest in a domain name, it is not bad faith for it to offer the domain name for sale at a market price.

The Respondent says also that the references to by the Complainant to bad faith use by "passive holding" as considered by the panel in *Telstra Corporation Limited v. Nuclear Marshmallows* is misconceived because passive holding requires a bad faith registration. Moreover, the Panel must examine all the circumstances of the case in order to determine whether the Respondent is acting in bad faith. None of the *indicia* set out in *Telstra supra* are applicable, save for the use of a privacy service, which the Respondent has explained. In any event, the Respondent says that the use of a privacy service is not, in itself, indicative of bad faith; see *Mediaset S.p.A. v. Didier Madiba, Fenicius LLC*, WIPO Case No. D2011-1954.

C. Complainant's Supplemental Filing

The Complainant challenges whether Mrs. Haggipavlou should be treated as a Respondent on the basis that it is the party identified on the registrar's WhoIs database as the registrant, as at the date of the submission of a complaint, that is the proper respondent.

The Complainant submits that common law trademark rights are sufficient for the purpose of paragraph 4(a)(i) of the Policy and three-letter acronyms can be properly protected as trademarks. Because the Complainant's domain name broker has acknowledged that three letter domain names are rare and can be of considerable value, this amounts to a concession by the Respondent that KTG, when used by the Complainant, is inherently distinctive and entitled to trademark protection. The Complainant's evidence of use of KTG demonstrates that "the mark KTG is recognized as a source identifier by relevant purchasers in the market for mobile kitchens". Moreover, the fact that "a handful of other parties" use KTG does not negate the Complainant's trademark rights.

The Complainant says that bad faith can be imputed to Mrs. Haggipavlou because the Response does not suggest that she took any steps to check for third party rights at the point when the disputed domain name was transferred to her. Furthermore, she took action to monetize the disputed domain name and allow her broker to approach the Complainant when it knew that the Complainant used its <k-t-g.com> domain name. Mrs. Haggipavlou was also in breach of paragraph 2 of the Policy which provides that, by applying to register a domain name, the applicant thereby represents and warrants that its registration will not infringe upon or otherwise violate the rights of any third party. Accordingly, not checking whether the disputed domain name infringed or violated someone else's rights, amounts to "willful blindness" and therefore bad faith; see *Archer-Daniels-Midland Company v. Shawn Downey*, WIPO Case No. D2015-0415.

The Complainant also asserts bad faith in respect of the registration of the disputed domain name by HUKU LLC in November 2007. A simple search would have revealed that the Complainant owned the identical domain name, absent two hyphens, and actively used it to market and sell mobile kitchens. HUKU LLC was accordingly also in breach of its obligations under paragraph 2 of the Policy; see *Harness Racing Australia v. Acronym Wiki Pty Ltd,* WIPO Case No. DAU2011-0007. It says that the purchase of the disputed domain name is "persuasive evidence for an inference of bad faith" when combined with the fact that the HUKU LLC concealed its identity, made no use of the disputed domain name, failed to search for the Complainant's domain name, closed its eyes to the Complainant's <k-t-g.com> domain name and active trademark use and purchased large volumes of domain names that it never intended to use.

D. Respondent's Supplemental Filing

The Respondent says that, whilst HUKU LLC was properly named as a Respondent in the Complaint, on the unusual facts of this case, Mrs. Haggipavlou should, at least, be treated as a second Respondent. The Complainant's purported challenge as to whether the disputed domain name properly passed to her under her brother's will is outside the scope of the Policy.

The Respondent does not challenge the principle that KTG is capable of serving as a trademark. However, it repeats its challenge as to whether, on the basis of the evidence adduced, the Complainant has established any common law rights in KTG. It notes that the Complainant made no attempt to bolster its evidence when serving its Supplemental Filing. Similarly, it says that there is no basis for the Complainant's assertion that the Respondent was required to have used the disputed domain name in connection with products and services unrelated to the Complainant in order to avoid a finding of bad faith.

The Respondent says that says that there is no evidence that HUKU LLC was aware of the Complainant as at the date of registration of the disputed domain name, nor even any facts from which this might reasonably be inferred. There is no basis for the assertion that Mrs. Haggipavlou was required to have checked for third party rights worldwide before offering the disputed domain name for sale. Moreover, if there was any such obligation, she would have found numerous parties with registered trademarks for KTG, or which included KTG as part of their trademark, which would have given them a better claim to the disputed domain name than the Complainant. Furthermore, there is an express denial by Mrs. Haggipavlou, that she was aware of the Complainant when she inherited the disputed domain name.

The Respondent says that the interpretation that the Complainant has sought to put on the Respondent's obligations under paragraph 2 of the Policy is not in line with the current approach taken by UDRP panels. It draws attention to the decision of the panel in *TOBAM v. M. Thestrup / Best Identity*, WIPO Case No. D2016-1990, in which the panel commented that; "While there are a handful of UDRP cases around 2009-2010, including those cited by the Complainant, which considered alternative approaches based on the warranty in paragraph 2 of the UDRP and the wording of paragraph 4(b), amongst other things, the overwhelming approach of UDRP panels since then has been to affirm the literal meaning of paragraph 4(a)(iii) of the Policy and to require bad faith at the time of registration or acquisition of the disputed domain name."

Lastly, the Respondent says that the Complaint is abusive. It says that, whatever the position as at the time of filing the Complaint, the Complainant should have reviewed and reconsidered its position following service of the information disclosed in its Response before making serious and unfounded accusations about innocent people.

6. Discussion and Findings

Mrs. Haggipavlou has produced detailed evidence which establishes that she is the owner of the disputed domain name together with an explanation as to why the WhoIs record, which would usually comprise a reliable record of the current registrant's details, was not updated. The Panel therefore deals with this Complaint on the basis that she is a de facto Respondent, together with HUKU LLC. As the Respondent has said, any substantive challenge that the Complainant wishes to make to the means whereby title has passed to her is outside the scope of the Policy. Hereafter, HUKU LLC and Mrs. Haggipavlou are referred to, individually and collectively, as the Respondent but are specifically identified where the context so requires.

Paragraph 4(a) of the Policy provides that, for that the Complainant proves each of the following three elements in order to succeed in its Complaint:

(i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and

(ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and

(iii) the disputed domain name has been registered and is being used in bad faith

A. Identical or Confusingly Similar

For the purpose of considering confusing similarity, the generic Top Level Domain ("gTLD") ".com" is disregarded as it is a technical requirement of registration. The Panel is required to undertake a straightforward comparison between the trademark on which the Complainant relies and the disputed domain name.

The WIPO Overview 3.0 explains that, in order to establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant's goods and/or services. It explains that relevant evidence demonstrating such acquired distinctiveness includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (*e.g.* consumer, industry, media) recognition, and (v) consumer surveys.

The evidence in support of the Complainant's assertion comprises the following;

- a declaration from the Complainant's marketing director which asserts, without providing any supporting detail, that the Complainant is "also known as KTG" and that "[i]t has used the trademarks *Kitchens To Go* and *KTG* since at least July, 2000";

- an undated photograph of a trailer. This has "Kitchens To Go" on the side and rear. The side portion of the trailer also features the Complainant's website address, "www.k-t-g.com", as well as (in large, but faint, lettering) K-T-G;

- a single page from the Complainant's website address with a heading for an article "KTG presents on Disaster Preparedness@ ANFP# ACE2015". The body of the article refers to another website address for the Complainant, not mentioned by it in its submissions, namely http://kitchens-2-go.com. There are five references to KTG in the sidebar, such as "KTG Blog" and "KTG Webinars", which evidently link to other parts of the Complainant's website. Another link in the same sidebar is to "Kitchens To Go in the News";

- the first page of a letter dated January 2005, on notepaper headed "Kitchens To Go", which thanks the sender of an earlier letter for their interest in "Kitchens To Go" (KTG"). After defining KTG in this manner as an abbreviated term for "Kitchens To Go", the term "KTG" is used in the remainder of the letter to denote the Complainant;

- a 2004 technical design drawing in which the letters KTG are used as part of a drawing reference, KTG-078F.

The four pages of evidence show no cohesive use of "KTG" as a common law trademark; they are somewhat random and seemingly isolated. This thin evidence does not substantiate the assertions in the Complaint, that the Complainant has used its KTG trading style "since at least July 2000" on a "continuous, widespread and open" basis and that it has "invested significant money, time and effort to promote…its KTG trademark throughout the US and internationally". Moreover, the Complainant has not explained why, if it genuinely sought to develop "KTG" as a brand, it did not take the obvious step of allocating part of its alleged significant investment on registering a trademark for it, as it had done in respect of KITCHENS TO GO.

The evidence has the hallmarks of a trawl by the Complainant through its historical records in order to produce whatever it could find to support its over-ambitious claims. In any event, they fall short of surmounting the evidential threshold which panels expect to see as evidencing common law trademark rights, as outlined in the WIPO Overview 3.0.

The Panel accordingly finds that the Complainant has failed to show that the disputed domain name is identical or confusingly similar to a trademark or service mark in which it has rights.

Even if there were stronger evidence of common law rights, the Panel notes that the Complaint would fail on other grounds.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy sets out, without limitation, three circumstances whereby a respondent might establish that it has rights or legitimate interests in respect of a domain name. In summary, these are if;

(i) before any notice of the dispute, the respondent has used or made demonstrable preparations to use, the domain name in connection with a *bona fide* offering of goods or services; or

(ii) the respondent has been commonly known by the domain name, even if it does not have any trademark rights; or

(iii) the respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Neither Respondent has demonstrated that it has rights or interests which fall clearly within the above circumstances. However, as set out in *Greenfort Partnerschaft von Rechtsanwälten mbB v. CheapYellowPages.com*, WIPO Case No. D2016-0796 "The Majority of the Panel is of the view that domain name resellers in general may have legitimate interests in the domain names being offered for sale at least where such domain names do not consist of coined terms, so that such domain names could be re-sold to many possible legitimate users rather than being of value only to particular trademark owners."

The WIPO Overview 3.0, section 2.10.2 gives further guidance namely that "for a respondent to have rights or legitimate interests in a domain name comprising an acronym, the respondent's evidence supporting its explanation for its registration (and any use) of the domain name should indicate a credible and legitimate intent which does not capitalize on the reputation and goodwill inherent in the complainant's mark."

In *Banca Monte dei Paschi di Siena S.p.A v. Charles Kirkpatrick*, WIPO Case No. D2008-0260 (<mps.mobi>) the panel commented that "[t]he Respondent was at the time of registration, of the view that no one company could claim exclusive rights in MPS because it stood for so many things. From its own searches of the term 'MPS', the Panel finds the Respondent's view reasonable." The panel in *SK Lubricants Americas v. Andrea Sabatini, Webservice Limited*, WIPO Case No. D2015-1566 found that "…the right to register such acronyms cannot be unlimited. Knowing of a complainant's trademark, registering a domain name to copy the trademark or using it to trade off it or to target the trademark owner or act inappropriately towards it must put the registrant in a different position and put at risk its claim to have a right or legitimate interest in the domain name. But in the absence of such factors […] the Respondent has as much right as anyone else to use expressions such as acronyms, generic, dictionary words or other domain names made up from a small number of letters."

There is no direct evidence from HUKU LLC as to the motivation for registering the disputed domain name as Mr. Behl has sadly died. However, the disputed domain name was one of over one hundred domain names registered by HUKU LLC. There is no evidence that the names of any of them infringe third party trademark rights. The Panel infers from this that HUKU LLC sought to avoid knowingly infringing third party rights when registering its many and varied domain names. This, in turn, indicates, on a balance of probabilities, that HUKU LLC was unaware of either the Complainant or any other company with trademark rights in KTG as at the time of its registration of the disputed domain name. The position of HUKU LLC is therefore analogous to that of the respondent in *Banca Monte supra.*

The Panel would point out however that a response which merely cites a number of other traders using a particular mark, or the fact that a term may have a particular (dictionary) meaning is on its own not an answer to vest rights in a respondent.

The Panel accordingly finds that the Complainant has not satisfied paragraph 4(a)(ii) of the Policy with respect to the disputed domain name.

C. Registered and Used in Bad Faith

For the purpose of assessing whether the disputed domain was registered in bad faith, it is material to consider first HUKU LLC's acquisition of the disputed domain name in 2007.

As is evident from the commentary above, there is no evidence to support the Complainant's assertion that HUKU LLC had in mind the Complainant's alleged trademark rights in "KTG" or the trademark rights of any other owner of registered or unregistered trademark rights in KTG as at the date of its registration of the disputed domain name. The list of domain names registered by HUKU LLC points in the other direction; if all the other domain names evidently do not infringe any third party trademark rights, why would its intentions in respect of the disputed domain name be any different?

Turning now to the transfer from HUKU LLC to Mrs. Haggipavlou, the Panel does not accept the Respondent's submission that this transfer should be excluded from consideration; there is a transfer of beneficial ownership and that amounts, in effect, to a fresh registration. See *Ideenhaus Kommunikationsagentur GmbH v. Ideenhaus GmbH*, WIPO Case No. D2004-0016, where the panel concluded that there is no basis to differentiate between a direct registration and a registration after transfer, for the purposes of the Policy. See also *Dixons Group Plc v Mr. Abu Abdullaah*, WIPO Case No. D2000-1406, which found that registration extends beyond the original act of registration and covers subsequent acquisitions of the domain name, and *Société Air France v. Vladimir Federov*, WIPO Case No. D2003-0639, where it was held that a transfer between a respondent and its predecessor still amounted to a registration of the domain name within the meaning of the Policy.

However, the Panel does not accept the Complainant's submission that, on inheriting a large portfolio of domain names, this imposed on Mrs. Haggippavlou a duty of due diligence to search worldwide to see if any of them might infringe any third party rights, prior to registering them in her name. The circumstances in *Archer-Daniels-Midland supra*, relied on by the Complainant, were very different. In that case the complainant had extensively protected its 3-letter mark through trademark registrations and, moreover, the panel found that the complainant's trademark had developed substantial goodwill and reputation such that it was a well-known mark, including in the United States where the respondent was located.

When considering whether passive holding of a domain name might amount to bad faith, panelists will consider the totality of the circumstances. The factors are most commonly considered include: (i) the degree of distinctiveness or reputation of the complainant's mark – as discussed above, on the present record the Complainant's reputation in "KTG" is either nil or slight, (ii) the failure of the respondent to submit a response, or to provide any evidence of actual or contemplated good-faith use – this is not applicable, (iii) the respondent's concealing its identity or use of false contact details – this is only one consideration and, on these facts, nothing in the use of a privacy service by the Respondent is suggestive of bad faith and (iv) the implausibility of any good faith use to which the domain name may be put – this is inapplicable but does not weigh in the Respondent's favour.

On a number of occasions, the Complainant has incorrectly summarized the circumstances in which bad faith will be found, as set out at paragraph 4(b)(i) of the Policy. It is insufficient for the Complainant to establish simply that the attempted sale has been "for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name" – which, it has asserted, "**conclusively establishes** [emphasis in the original] that the domain name has been registered and used in bad faith". The Complainant must also establish that the Respondent "registered or acquired the domain name <u>primarily for the purpose of selling</u> [emphasis added], renting, or otherwise transferring the domain name <u>to the complainant</u> [emphasis added] who is the owner of the trademark or service mark <u>or to a competitor of that complainant</u> [emphasis added]". There is no evidence, even by inference, to support such a finding.

The Panel also rejects the argument that the registrations in 2007 and 2017 should be deemed to be in bad faith because of the provisions of paragraph 2 of the Policy, albeit not for the principal reason advanced by the Respondent. The reality is that there is no basis for concluding either that the Complainant has acquired rights in KTG, for the purposes of paragraph 4(a)(i) of the Policy, either in 2007 or 2017, or that there is any evidence to support bad faith registration and use. Accordingly, the provisions of paragraph 2 of the Policy, however, they are construed, are not of application to the facts in these proceedings.

The Panel therefore finds that the Complainant has failed to show that the Respondent has either registered or used the disputed domain name in bad faith.

D. Reverse Domain Name Hijacking

Reverse Domain Name Hijacking is defined under the Rules as "using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name".

Paragraph 15(e) of the Rules provides that, if "after considering the submissions the panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding".

As set out in the WIPO Overview 3.0 section 4.16, reasons articulated by panels for finding Reverse Domain Name Hijacking include: (i) facts which demonstrate that the complainant knew it could not succeed as to any of the required three elements – such as the complainant's lack of relevant trademark rights, clear knowledge of respondent rights or legitimate interests, or clear knowledge of a lack of respondent bad faith (such as registration of the disputed domain name well before the complainant acquired trademark rights, (ii) facts which demonstrate that the complainant clearly ought to have known it could not succeed under any fair interpretation of facts reasonably available prior to the filing of the complaint, including relevant facts on the website at the disputed domain name or readily available public sources such as the WhoIs database, (iii) unreasonably ignoring established Policy precedent notably as captured in this WIPO Overview – except in limited circumstances which *prima facie* justify advancing an alternative legal argument, (iv) the provision of false evidence, or otherwise attempting to mislead the panel, (v) the provision of intentionally incomplete material evidence – often clarified by the respondent, (vi) the complainant's failure to disclose that a case is a UDRP refiling, (vii) filing the complaint after an unsuccessful attempt to acquire the disputed domain name from the respondent without a plausible legal basis, (viii) basing a complaint on only the barest of allegations without any supporting evidence".

Save in respect of reasons (iv), (v) and (vi), each of the above reasons is present to at least some degree in the way in which the Complainant has conducted these proceedings.

There is inadequate evidence to support the Complainant's assertions that it had common law rights in "KTG" or even that, prior to being approached by the Respondent's domain name broker, it actually regarded itself as having any rights in "KTG". It never made any attempt to recover or acquire the disputed domain name in the period of approximately sixteen years since the disputed domain name was registered. Its evidence of common law rights comprised no more than a cluster of four disparate instances, spread over many years, where KTG or K-T-G had been used on company letters, documents, a website, or on the side of a vehicle.

Similarly, even discounting the information which became available following service of the Response, there has been none of the *indicia* present which point to bad faith registration. There has never been anything to suggest that either HUKU LLC or Mrs. Haggipavlou had targeted the Complainant.

The facts point clearly towards the Complainant, having taken no steps in respect of the disputed domain name since it was first registered in 2001, taking the opportunistic view that, once it had been offered the disputed domain name for sale for a sum greater than the likely costs of registration, it could force the Respondent to sell it for a sum which was less than its market value. Failing that, that it could try to apply further pressure by bringing an unmeritorious claim under the Policy which made exaggerated accounts of rights and sweeping and unsupported assertions of bad faith against the Respondent.

The Overview 3.0 explains that "[g]iven the undertakings in paragraphs 3(b)(xiii) and (xiv) of the UDRP Rules, some panels have held that a represented complainant should be held to a higher standard". This approach was adopted in *Adopts Pick Enterprises, Inc. v. Domains by Proxy, LLC, DomainsByProxy.com / Woman to Woman Healthcare / Just Us Women Health Center f/k/a Woman to Woman Health Center*, WIPO Case No. D2012-1555 "The fact that Complainant is represented by counsel makes the filing of this Complaint all the more inexcusable. The matters identified in the preceding paragraph are not Policy arcana; each is a precedent of long standing and derived from scores of cases, and each addresses a fundamental Policy requirement." Likewise, see *Centroamerica Comercial, Sociedad Anonima de Capital Variable (CAMCO) v. Michael Mann*, WIPO Case No. D2016-1709; "the Complainant, who is represented by specialist attorneys who appear to have specific expertise in this area, knew or ought to have known that this was the case".

In these proceedings, the Complainant is represented by experienced attorneys. This removes any likelihood that the conduct described above was inadvertent or due to ignorance of the provisions of the Rules and the Policy.

The Panel therefore concludes that the Complaint was brought in bad faith and constitutes an abuse of the administrative proceeding.

7. Decision

For the foregoing reasons, the Complaint is denied. In addition, the Panel concludes that the Complaint was brought in bad faith and constitutes an abuse of the administrative proceeding.

Antony Gold
Presiding Panelist

Ellen B Shankman
Panelist

Nick J. Gardner
Panelist
Date: February 6, 2018