



-----	X	
Lodging Kit Company, Inc.,	:	
13492 Route 12	:	
Bonnville, NY 13309	:	Domain Name in Dispute:
	:	
Complainant,	:	lodgingkits.com
	:	
v.	:	Case Number:
	:	
LodgingKits	:	FA-090900-1283398
177 Ascension Street	:	
Passaic, NJ 07055	:	
	:	
Respondent	:	
-----	X	

**RESPONDENT'S SUPPLEMENTAL RESPONSE TO
COMPLAINANT'S ADDITIONAL SUBMISSION**

**I. Complainant's Additional Submission is Wholly
Insufficient to Rehabilitate the Inadequate Complaint.**

Respondent has thoroughly demonstrated the gross inadequacy of Complainant's original filing in this case. The Complainant has now made an additional submission attempting, gamely but without success, to rehabilitate the Complaint and to introduce new arguments and claims. Respondent herewith specifically responds to the statements and allegations contained in Complainant's Additional Submission.

[a.] **Complainant has NO relevant rights in the trademark in question, as necessary under Policy ¶ 4(a)(i).**

**Complainant has not shown rights
in the mark sufficient under the Policy:**

The phrase LODGING KIT, with or without the .COM, describes (in whole) the goods or services provided by Complainant, and as such the mark is descriptive. *See, Missouri Association of RV Parks and Campgrounds v. Sugar Mountain Design Company*, FA 1274853 (Nat. Arb. Forum Sept. 10, 2009). Where a mark is even somewhat descriptive, the Policy requires that Complainant come forward with proof of secondary meaning.¹ *See, Id.*

¹ It is no contradiction to note that a complainant, generally, can point to registration (on the Principal Register) without more to support its claim of rights under 4(a)(i). A successful registration of an otherwise descriptive mark on the

(<campinmissouri> descriptive of the provision of website resources for those who may want to camp in Missouri; requiring complainant prove secondary meaning to establish rights in the mark). "Secondary meaning is used to indicate that an unprotectable descriptive mark has attained a level of distinctiveness warranting its protection as a trademark." *Id.*

Complainant is faced with the grim reality that LODGING KIT simply has not attained sufficient secondary meaning to serve as Complainant's basis for this Proceeding.²

Complainant has conceded the absence of secondary meaning in a statement made under penalty of perjury before the US Trademark Office. Complainant's application for registration of the mark was rejected by the Office "because the applied-for mark merely describes features of the [Complainant's] services." (Response Annex B.) As clearly laid out in the USPTO Trademark Manual of Examining Procedure, 5th edition³ (TMEP), an applicant faced with such a rejection has two choices, barring direct objection to the examiner's determination or abandonment: the applicant may either assert acquired distinctiveness in the mark or the applicant may amend the application to the Supplemental Register. *See*, § 1209.02 ("[T]he examining attorney should provide appropriate advice concerning a possible amendment to the Supplemental Register or assertion of a claim of acquired distinctiveness.") Excerpts of the TMEP are attached hereto as Annexes D and E.

In response to the Trademark Office's assertion that the LODGING KIT mark was devoid of any secondary meaning, Complainant did not argue for any acquired secondary meaning, nor submit any evidence supporting such a claim; Complainant instead conceded the matter, choosing to amend to the Supplemental Register. (Response Annex C.)

It is important to note, further, that the Trademark Office determination was made even in light of Complainant/applicant's claim of use since October 1989. (Complainant's initial trademark application, Annex F hereto. *Cf.*, Annex 1 to Complainant's Additional Submission ¶ 3.)

The Policy simply does not countenance Complainant's efforts; where the Complainant has no rights in the mark in question, it can not satisfy its burden under Paragraph 4(a)(i). *See, Roberta Chiappetta dba Discount Hydroponics v. C. J. Morales*, D2002-1103 (WIPO Jan. 20, 2003) ("[W]hile Respondent's domain name is identical to the Complainant's trademark, the Complainant has no rights in the trademark and cannot succeed in meeting Paragraph 4a (i) [sic] of the Policy requirements.")

Principal Register of the Trademark Office is essentially presumptive evidence of such secondary meaning, particularly in light of that Office's procedures for vetting such marks.

² Moreover, as discussed below, the mark had certainly not attained that secondary meaning in 2005, when the Respondent registered its domain name.

³ Although the 6th edition (Sept. 2009) is current, the 5th edition (Sept. 2007) controlled the examination of Complainant's application. While the 6th edition makes some structural changes and includes more cases, the substance and relevant language are unchanged with respect to the sections cited.

Complainant misrepresents Respondent's argument in an attempt to obfuscate its lack of rights:

In its Additional Submission, Complainant sets up two "straw man" arguments, entirely misrepresenting Respondent's submission, and then (unsurprisingly) makes arguments to defeat them. These can be dispensed with briefly.

Complainant argues that that the addition of the letter "S" does nothing to render the LODGINGKITS.COM domain name less than substantively identical to Complainant's claimed LODGING KIT mark. Respondent has nowhere argued otherwise.

What bars Complainant's success is that even conceding, *arguendo*, that the domain name is identical to the mark, the Complainant has no rights in the mark to defend. The mark is – by Complainant's own concession – merely descriptive and devoid of secondary meaning.

Complainant also contends adamantly that "[t]he UDRP does not distinguish between registered and unregistered marks." (Complainant's Add'l Submission, p. 2.) Here again, Complainant is rising to meet a challenge that it has invented for itself; Respondent has nowhere claimed that the UDRP speaks only to registered marks.

However, in order to successfully assert common-law or unregistered trademark rights, a complainant must show that the name has become a distinctive identifier associated with the complainant or its goods and services. *See, Amsec Enterprises, L.C. v. Sharon McCall*, D2001-0083 (WIPO April 3, 2001) ("The mark . . . is obviously descriptive of Complainant's services. Therefore, to establish common law rights, Complainant must prove secondary meaning. . . . Given the extremely weak character of Complainant's mark, I find that the evidence of secondary meaning is inadequate to prove any enforceable rights in the mark.") Complainant has failed abjectly to plead or prove secondary meaning sufficient to give it rights enforceable under the Policy.

Moreover, the cases Complainant cites for the proposition are entirely inapposite. In *Matchnet PLC v. MAC Trading*, D2000-0205 (WIPO May 11, 2000), the Trademark Office explicitly accepted the applicant's arguments that the mark in question was suggestive, not descriptive. (Selected documents from AMERICAN SINGLES application history, attached hereto as Annex G.) In *Fishtech, Inc. v. Richard Rossiter*, FA 0092976 (Nat. Arb. Forum March 10, 2000), the mark in question – FISHTECH – is clearly suggestive, particularly in light of the facts that (a) the focus of that business was on Abalone, which is not a fish at all, and (b) technology was not the primary thrust of the business. (December 2000 Internet Archive record for FISHTECH.COM, attached hereto as Annex H.) Complainant's inclusion of *Altavista Co. v. Tubul Law Consulting*, FA-0095569 (Nat. Arb. Forum Nov. 14, 2000) is, in fact, puzzling. There is no mention anywhere in that decision of rights arising at common law, and in fact

"[c]omplainant's numerous trademark registrations evidence established rights in the . . . mark." *Id.* (emphasis added).⁴

The Complainant's inclusion of the Eric Martin Declaration is insufficient:

In neither the initial Complaint nor the Additional Submission has Complainant made an actual, direct assertion of secondary meaning.⁵ Apparently recognizing the failure of its initial Complaint, however, Complainant has included in the Additional Submission the Declaration of Eric Martin (Annex 1 to Complainant's Additional Submission, hereafter "Martin Decl."), which includes certain assertions that might be considered in a determination of secondary meaning.

These assertions can be summed up as follows: Complainant has been using LODGING KIT for a long time, and should be rewarded with a finding of secondary meaning. (Martin Decl. ¶¶ 3 – 6.)

As discussed above, this assertion was included in the Complainant's initial application to the Trademark Office, and was therefore considered (and rejected) by the Office in its determination of descriptiveness, and was further conceded as insufficient to show secondary meaning by Complainant itself. Even setting that aside, the Complainant can not carry its burden by the simple inclusion of the Martin Declaration.

Where, as here, the mark is a highly descriptive term "a party seeking to establish exclusive rights carries a heavy burden of proof in removing the term from the public domain." *Snowboards-for-sale.com, Inc. v. Name Administration Inc.*, D2002-1167 (WIPO Feb. 19, 2003).

The bald assertion that "Complainant has expended substantial time and money . . . in creating goodwill in said mark," (¶ 4) can not carry that burden. *See, Amsec Enterprises*, D2001-0083 ("Here, the only evidence presented is the bald claim that the mark has been used since 1992, and that Complainant's gross sales have exceeded \$7 million. The only evidence of the nature and manner of use is a web page dated January 11, 2001. Given the extremely weak character of Complainant's mark, I find that the evidence of secondary meaning is inadequate to prove any enforceable rights in the mark."); *see also, Molecular Nutrition, Inc. v. Network News & Publ'ns*, FA 156715 (Nat. Arb. Forum June 24, 2003) (finding that the complainant failed to establish common law rights in its mark because mere assertions of such rights are insufficient without accompanying evidence to demonstrate that the public identifies the complainant's mark exclusively or primarily with the complainant's products); *Lowestfare.com LLA v. US Tours & Travel, Inc.*, AF-0284 (eResolution Sept. 9, 2000) (finding that marks classified as descriptive cannot be protected unless secondary meaning is proven and to

⁴ The *US Postal Service* and *Cedar Trade* cases discussed neither the strength of the marks nor the question of secondary meaning.

⁵ Nor would it be appropriate for Complainant to do so in its Additional Submission, as discussed below.

establish secondary meaning the complainant must show that the public identifies the source of the product rather than the product itself).

Respondent does not here dispute that Complainant has been in business as LODGING KIT COMPANY for many years. But without credible evidence concerning the development of secondary meaning – beyond mere assertions to that effect – that is simply not enough to show secondary meaning sufficient satisfy the requirements of the Policy. *See, Deborah Kanani d/b/a Mendocino Weddings v. Ted Kidwell*, D2004-0159 (WIPO May 27, 2004) (“While it is undisputed that Complainant has carried out her business under the [descriptive term] for over a decade, no other credible evidence concerning the other tests has been introduced. . . . Notably, Complainant has not submitted evidence of total advertising expenditures, the amount of sales under the mark or most importantly, a consumer survey or evidence of media recognition”)

Without a showing of secondary meaning, Complainant's registration on the Supplemental Register does not confer rights in the mark under Policy ¶ 4(a)(i). *See, Martha Stewart Living Omnimedia, Inc. v. Joe Perez*, FA 259275 (Nat. Arb. Forum June 24, 2009) (holding that Supplemental Register registration of EVERYDAY FOOD did not confer rights to Complainant under the Policy); *see also, CyberTrader, Inc. v. Bushell*, D2001-1019 (WIPO Oct. 30, 2001) (stating that Supplemental Register “provides the Complainant with no protectable rights” in its marks); *see also Chiappetta v. Morales*, D2002-1103 (WIPO Jan. 20, 2003) (holding that the complainant’s registration of the DISCOUNT HYDROPONICS mark on the Supplemental Register did not confer any rights under the UDRP).

[b.] **Respondent has rights or legitimate interests in respect of the domain name.**

**Complainant ignores
the shifting burden of proof:**

Complainant opens its argument by noting that “[n]owhere does [Respondent] deny knowledge of Complainant's domain name dispute.” (Complainant's Add'l Submission, p. 3.) The gravamen of this challenge is that Respondent did not independently come forward with proof of its legitimate interests in the domain name.

Complainant disregards, however, the shifting burden of proof applicable under the Policy. Complainant must first make a *prima facie* case that Respondent lacks rights and legitimate interests in the disputed domain name, and then the burden shifts to Respondent to show it does have such rights or interests. *See, Hanna-Barbera Prods., Inc. v. Entm't Commentaries*, FA 741828 (Nat. Arb. Forum Aug. 18, 2006); *AOL LLC v. Gerberg*, FA 780200 (Nat. Arb. Forum Sept. 25, 2006).

Complainant is attempting to set aside its own obligation under the Policy to make a *prima facie* showing before the burden shifts to Respondent. That is to say, nowhere did Complainant make any sort of showing or proof supporting the assertion under Policy ¶ 4(a)(ii). The Complaint simply restates the language of the Policy and points to the argued similarity of the two domain names.

Moreover, Respondent did, in fact, make arguments and submit evidence supporting its rights and legitimate interests in the disputed domain name. (Response, p. 3 - 5; Soffer Decl. ¶¶ 14 - 24) It is not necessary to simply rehash them here.

Respondent could have no notice of any "dispute":

Complainant further claims that "Respondent clearly knew, or should have known, of Complainant's prior rights in the disputed domain name." (Complainant's Add'l Submission, p. 3.) As established above, however, there exist no such rights in the disputed domain name.

Complainant in this case seems to confuse ownership of a domain name with ownership of trademark rights in domain name. "A domain name can give rise to trademark rights and a trademark can be used as a domain name, but mere registration of one does not automatically bestow one with rights to both." *Missouri Association of RV Parks*, FA 1274853 (emphasis added). Similarly, simply naming a business with terms completely descriptive of the goods or services provided can not, on its own, give rise to trademark rights in that term. Without some evidence of secondary meaning – which evidence Complainant has conceded does not exist – the LODGINGKIT.COM domain registration is insufficient to even create a "dispute" concerning LODGINGKITS.COM. Respondent could have no notice of such a dispute because no such dispute existed.

The descriptive nature of the mark supports Respondent's legitimate interest:

It is beyond cavil that where a respondent is using a descriptive or generic word to describe a product or business, or profit from the "non-trademark" value of the word, then that Respondent has a legitimate interest in the domain name. *See, Morgan Stanley v. Michael Woods*, FA 0604103 (Nat. Arb. Forum Jan 16, 2006) ("When a non-trademark use is made, that does not depend for its value on the existence of the trademark, it is then appropriate to use the trademark as another's domain."); *see also, Asphalt Research Tech., Inc. v. Nat'l Press & Pub'ing, Inc.*, D2000-1005 (WIPO Nov. 13, 2000) ("Common words and descriptive terms are legitimately subject to registration as domain names on a 'first come, first served' basis. Moreover, neither mere registration, nor general offers to sell, domain names which consist of generic, common, or descriptive terms can be considered acts of bad faith.")

In the instant case, Respondent is using the words **LODGING KIT** to indicate the goods being sold at the website in question.⁶ Complainant has certainly not invested the words with any sort of trademark value on which Respondent might trade. The value is only in describing the goods offered in a store or at a site, presenting a paradigmatic case of almost automatic legitimate interest. *See, The Curvon Corporation v. Lauren Kallareou, The Tack Box*, D2001-0565 (WIPO June 21, 2001) ("It is not apparent to the Panel why a dealer's registration of a domain name which is descriptive of a product he or she sells should be viewed as lacking in legitimacy.")

Complainant (again) imputes imaginary arguments to Respondent:

Complainant asserts that "[i]f mere registration of a domain name were sufficient to establish rights or legitimate interests for the purpose of Paragraph 4(a)(i) [sic] of the Policy, then all registrants would have such rights and no complainant could succeed" (Complainant's Add'l Submission, pp. 3-4.) But Respondent never makes such an argument.

On the other hand, Respondent enthusiastically makes the argument that in some situations registration alone is sufficient in this regard. Specifically, the registration is sufficient to establish legitimate interests under 4(a)(ii) where the domain name registered is descriptive, the domain is used in actually providing the goods or services so described, there is no other party with any enforceable rights in the domain name or similar terms, and the domain registration and use otherwise bear the hallmarks of a bona fide business venture.

Rather, it is Complainant that seeks a rule that would swallow the Policy. Complainant is asserting rights in an otherwise unprotectable mark solely based on its registration of a domain name containing that mark (and possibly a storefront with the same unprotectable mark.) If mere registration in that context were sufficient under 4(a)(i), then the balance struck by the Policy would be severely skewed.

Complainant also asserts that "[Respondent's] statements support a finding that Respondent is not making a legitimate noncommercial or fair use of the domain name without intent for commercial gain." Again, Complainant has raised an adequate objection to a non-existent argument. Respondent has made it quite clear that the **LODGINGKITS.COM** domain is being operated for commercial gain. There is nothing inherent in "commercial gain" that automatically defeats "legitimate interest." *See, Advanced Drivers Ed. Prods. and Training, Inc. v. MDNH, Inc.*, FA 0567039 (Nat. Arb. Forum. Nov. 10, 2005) ("It is irrelevant that the site consists largely of paid advertising rather than original content. . . . Absent indicia of trademark infringement or dilution, the Respondent does have a legitimate interest in using a domain

⁶ Or at least Respondent was *initially* using the words to that end; Respondent here reserves to itself the right to claim (and adduce evidence supporting the claim) that Respondent has developed secondary meaning in the words, whether before this or any other tribunal.

name consisting of terms descriptive of the site. . . ."); *see also, The Curvon Corporation, D2001-0565* (respondent's site operated for commercial gain, but legitimate interests found.)

[c.] **Respondent's registration and use of the domain name is not – and has never been – conducted in bad faith.**

Bad faith registration and use are impossible where Complainant has no rights:

Complainant relies exclusively on Policy ¶ 4(b)(iv), attempting to claim that Respondent's registration and use of the disputed domain name is an attempt to trade on the established goodwill of Complainant's mark under Policy ¶ 4(a)(iii). As has been discussed to the point of fatigue, Respondent has shown that Complainant does not have and has never had rights in the purely descriptive terms of the mark in question; there is simply no "goodwill" for Respondent to be trading on. Consumers are NOT typing "LODGING KIT" (or "LODGING KITS") into their browser looking for Complainant's goods; they are doing so in order to find the goods or services described by those terms, regardless of source.⁷

As discussed in the original Response, Respondent's registration of the disputed domain name in 2005 predated Complainant's rights in the mark; Respondent necessarily lacked the requisite intent to register the disputed domain name in bad faith under Policy ¶ 4(a)(iii). *See, SPB Software House v. SPB Online Servs., Ltd.*, FA1067638 (Nat. Arb. Forum Oct. 17, 2007) ("When a domain name is registered before a trademark right is established, the registration of the domain name is not in bad faith under Policy ¶ 4(a)(iii) because the registrant could not have contemplated the complainant's non-existent right."); *see also, The Mrs. Fields' Brand, Inc. v. John Edwards*, FA1234524 (Nat. Arb. Forum Dec. 26, 2008) (same); *see also*, Response, pp. 6-7, cases cited therein, and attendant paragraphs of Soffer Decl.

Even if it had enforceable rights, Complainant makes no showing of bad faith:

Even surrendering, *arguendo*, to Complainant's delusion that its registration on the Supplemental Register and the attendant concession as to descriptiveness has nonetheless vested it with some enforceable rights in the term "Lodging Kit," Complainant has still failed to adduce any evidence supporting the third necessary proof concerning registration and continuing use in bad faith.

Complainant's claims on point are, in sum, that Respondent must have known about Complainant when registering its domain name, and that such knowledge is sufficient to satisfy the bad faith requirement of Policy ¶ 4(a)(iii). Respondent readily agrees that "evidence of bad faith includes actual or constructive notice of a commonly known mark at the time of registration" (Complainant's Add'l Submission, p. 4., citing *US Postal Srv. V. Consumer*

Information Organization, FA 0095757 (Nat. Arb. Forum Nov. 27, 2000)) (emphasis added). It would make little sense to impute to a respondent the intent to free ride on another's trademark without some knowledge of the existence of that trademark. While necessary, however, it is a much more controversial proposition to assert that such knowledge alone is sufficient to satisfy Policy ¶¶ 4(a)(iii) and 4(b)(iv).

The asserted knowledge of Complainant's mark must be buttressed by some other indicia of bad faith. *See, US Postal Srvc*, FA 0095757 (Referring to the 4(a)(ii) discussion: "We have already indicated the evidence that the respondent registered the domain name in order to take advantage of the traffic generated by persons seeking the complainant's goods and services." Only then did the panel refer to the actual or constructive knowledge element.) Evidence which can support a finding of bad faith under 4(b)(iv) includes (a) evidence undermining a reasonable explanation for the choice of domain name except for its similarity to the Complainant's marks, (b) an offer to sell the domain name to the Complainant, (c) presentation of the mark on the Respondent's website that is similar in nature to the use by the Complainant of its mark or marks, (d) any pattern of conduct by the Respondent indicating a willingness to register domain names opportunistically. *See, BasicNet S.P.A. v. Jinpoong, Park Myung Hwan*, D2008-0308 (WIPO May 6, 2008); *The Neiman Marcus Group, Inc. v. David Ball*, FA 1159811 (Nat. Arb. Forum May 2, 2008).

Complainant has made no showing whatsoever as to any of the elements listed, and Respondent hereby categorically denies those elements. Soffer Decl. ¶¶ 9-12, 21-22. It is notable that the fact that Respondent nowhere presents "LODGING KIT" on its website in a manner similar in nature to Complainant's use of the term stands in stark contrast to Complainant's own use of Respondent's business name and domain name as metatags in Complainant's own homepage. (See Annex I.)

Complainant fails to assert registration in bad faith:

The language of Policy ¶ 4(a)(iii) is conjunctive, requiring both registration and use in bad faith. *See, Sanitech Corp. v. Paton*, FA 0935273 (Nat. Arb. Forum Apr. 30, 2007) (holding that Policy ¶ 4(a)(iii) requires bad faith registration and use, so where a respondent initially registered the disputed domain name in good faith, the panel should deny the transfer of the disputed domain name to the complainant); *Greyson Int'l, Inc. v. Loncar*, D2003-0805 (WIPO Dec. 3, 2003) ("Paragraph 4(a)(iii) is conjunctive [requiring that] both registration and use in bad faith must be proven. Numerous panels have applied this language strictly, to deny complaints [where the complainant fails to prove both]."); *see also, American University v. Naveh, LLC*, FA 0323759 (Nat. Arb. Forum Oct. 21, 2004) ("It is important to note in this connection that the usTLD Policy differs materially from the older UDRP Policy, among other ways, in that the standard of proof of bad faith in the former policy is stated in the disjunctive

⁷ Again, Respondent reserves here the right to assert that Respondent has itself developed secondary meaning in the term.

(or) while the standard of proof of bad faith in the latter is stated in the conjunctive (and).

Thus, under the UDRP standard, a complainant must prove both that a respondent has registered a domain name in bad faith and that it uses it in bad faith.")

Complainant would have to at least plead that Respondent knew or should have known about Complainant's "well known" mark at the time of registration. Taking Complainant's assertions at their face value, Complainant has nowhere asserted common-law rights in LODGING KIT at the time of registration of the disputed domain name. The Martin Declaration speaks only to the present status of the alleged mark. "[LODGING KIT] is widely associated with goods and services provided by Complainant." (Martin Decl. ¶ 4.) (emphasis added). No mention is made anywhere of any such association at the time Respondent registered its domain name.⁸

Complainant's long delay supports a determination of Respondent's use in good faith:

Respondent registered its domain name and has been using it continuously since February 2005, a full four and a half years before Complainant initiated this UDRP. For that entire length of time, Complainant's LODGINGKIT.COM and Respondent's LODGINGKITS.COM have co-existed, selling the same or similar goods. That long delay supports a finding that Complainant, at least, felt that Respondent's use was made in good faith. *See, Churchill Insurance Co. Ltd. v. Churchill Financial Services, Ltd.*, FA 1270466 (Nat. Arb. Forum Sep.1, 2009); *see also, Square Peg Interactive Inc. v. Naim Interactive Inc.*, FA 209572 (Nat. Arb. Forum Dec. 29, 2003) ("Although laches by itself is not a defense to a complaint brought under the Policy, Complainant's delay in seeking relief is relevant to a determination of whether Respondent has been able to build up legitimate rights in the Domain Name in the interim, and whether it is using the Domain name in bad faith."); *Meat & Livestock Comm'n v. Pearce*, D2003-0645 (WIPO Oct. 27, 2003) ("Although laches is not a defence [sic] in itself under the Policy, the absence of any complaint over a long period of time in which domain names are in active use can suggest that such use does not give rise to a serious problem.").

II. Complainant has Engaged in Reverse Domain Name Hijacking.

A finding of Reverse Domain Name Hijacking is warranted where "the Complainant knew or should have known at the time it filed the Complaint that it could not prove that the domain name was registered in bad faith." *Futureworld Consultancy Pty Ltd. v. Online Advice*, D2003-0297 (WIPO July 18, 2003). Here, Complainant knew or should have known that its complete lack of enforceable rights in the LODGING KIT term, both at the time of Respondent's

⁸ Respondent here disregards Martin Decl. ¶ 9 as nonsensical. Common law rights in a descriptive term simply can not attach contemporaneous to first use of the term, regardless of adamant assertions to the contrary. Some amount of use in the marketplace must predate the development of secondary meaning. Since it would be impossible that Complainant "had common law rights in the mark "LODGING KIT" commencing with its first use on October 11, 1989), that paragraph of the Martin Declaration is most generously read to make no assertion as to the date such rights might have attached. To read it more strictly would require a conclusion that Mr. Martin has perjured himself.

registration of the domain name and going forward in time, through the present. Complainant moreover had necessarily fully considered any possible argument that might have allowed it to claim such rights during its proceeding before the Trademark Office. These facts are evidence that Complainant "did not seriously believe" that Respondent had violated the Policy. *Rolling Stone LLC v. Robbins Carnegie Inc.*, FA 318048 (Nat. Arb. Forum Oct. 14, 2004). This proceeding was initiated simply because Complainant wants the domain and thought it would "take a crack" with the UDRP, despite the fact that the Trademark Office was not inclined to award it a registration on the Principal Register. Such abusive use of the Policy is impermissible and should be admonished by this Panel.

III. Complainant's Additional Submission Should Not Be Considered by the Panel.

Although Respondent has taken pains to address the factual and legal contentions put forth in Complainant's Additional Submission, as a technical matter it should be noted that because Complainant's Additional Submission seeks to introduce new facts and new claims, it is in reality an attempt to amend the Complaint. Under Supplemental Rule 7(f), a Complainant's additional submission must not amend the Complaint. As such, the entirety of the Additional Submission should be disregarded.

In light of the foregoing, Complainant should NOT be granted any of the relief it seeks, and Respondent should be allowed to continue to use and control LODGINGKITS.COM.

Respectfully Submitted
for Respondent,



Ben D. Manevitz
Manevitz Law Firm LLC
October 19, 2009