

ADMINISTRATIVE PANEL DECISION

**Green Bay Packers, Inc. v. Moniker Privacy Services / Montgomery
McMahon**

Case No. D2016-1455

1. The Parties

Complainant is Green Bay Packers, Inc. of Green Bay, Wisconsin, United States of America (“United States”), represented by Quarles & Brady LLP, United States.

Respondent is Moniker Privacy Services of Fort Lauderdale, Florida, United States / Montgomery McMahon of Chatsworth, United States, represented by Lawson & Tarver LLP, United States.

2. The Domain Name and Registrar

The disputed domain name <totalpackers.com> (the “Domain Name”) is registered with Moniker Online Services, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on July 18, 2016. On July 19, 2016, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On July 20, 2016, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name, which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to Complainant on July 21, 2016 providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amended Complaint on July 26, 2016.

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 Respondent of the Complaint, and the proceedings commenced on July 29, 2016. In accordance with the Rules, paragraph 5, the due date for Response was August 18, 2016. Further to Respondent’s request and Complainant’s agreement, the Response due date was extended until September 7, 2016. The Response was filed with the Center

September 7, 2016.

Complainant filed an unsolicited Supplemental Filing on September 15, 2016. Respondent filed an unsolicited Supplemental Filing in response on September 19, 2016.

The Center appointed Christopher S. Gibson, Matthew S. Harris and W. Scott Blackmer as panelists in this matter on September 29, 2016. 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.

Supplemental Filings

The Center has already notified the parties that under the Rules no express provision is made for Supplemental Filings by either party, except in response to a deficiency notification or if requested by the Center or the Administrative Panel. Paragraphs 10 and 12 of the Rules in effect grant the Panel sole discretion to determine the admissibility of Supplemental Filings.

Here, the Panel has considered the reasons provided by Complainant in support of its request to file a Supplemental Filing, as well as Respondent's opposition to that request. Complainant has stated that, among other things, Respondent made certain misstatements in the Response, raised new arguments concerning laches, and made changes to his website after Complainant filed the Complaint. The Panel in its discretion decides that this is an appropriate case in which to admit and consider the Parties' Supplemental Filings insofar as they provide new information or arguments (e.g., such as Complainant's response to Respondent's arguments on laches and references to changes to Respondent's disclaimer after the Complaint was filed) that could not have addressed in the parties' initial submissions.

4. Factual Background

Complainant fields a professional American football team, the Green Bay Packers (the "Packers"), which competes in the National Football League ("NFL"). Complainant's team is one of the oldest teams in the NFL, having won 13 league championships, more than any other NFL team. The Packers are featured on national television throughout the pre-season, the regular season, and frequently in the post-season. Complainant engages in widespread marketing campaigns to continue to maintain and grow the name and brand for Green Bay Packers.

Complainant is the owner of the PACKERS trademark and several other PACKERS-formative marks, including: (i) PACKERS, registration no. 1100375, registered on August 22, 1978, with first use in commerce dating from January 1921; and (ii) GREEN BAY PACKERS, registration no. 1810704, registered on December 14, 1993, with first use in commerce dating from September 1963. The PACKERS mark is well-known and has developed strong reputation and goodwill among Packers' fans and the general population in the United States, where both parties are located. Complainant operates its official website for the Packers using the domain name <packers.com>.

The Domain Name was registered by Respondent on April 1, 2008. Respondent uses the Domain Name for a website that provides news, analysis, commentary, video, gossip and humor related to the Green Bay Packers. The homepage of the website linked to the Domain Name states that "Total Packers was founded in 2009 to cover Green Bay Packers football — the players, the coaches, games, business and just about anything else related to the Green Bay Packers." Respondent's website has operated continuously since its founding.

Complainant's legal representative first contacted Respondent on April 24, 2014.

5. Laches

The Panel considers it appropriate, before turning to the merits of this dispute, to assess and determine the parties' arguments concerning laches.

A. Respondent's Contentions on Laches

Respondent contends that Complainant's Complaint is barred under the doctrine of laches because Complainant waited too long to bring it. Respondent argues that laches is a valid defense in any domain name dispute where the facts so warrant, and a complaint may be denied under the doctrine of laches without considering the case on the merits. Respondent also argues that Complainant has cited old cases to say that this defense does not apply, but that the weight of authority and newer cases hold otherwise. In addition, Respondent argues relatedly that when both parties in an UDRP case are from the same country, it is appropriate to consider and apply that country's legal principles in evaluating the parties' rights and conduct. In the United States, laches is an equitable defense that has been held to apply in actions to enforce trademark rights. Laches applies when a claimant inexcusably delays asserting its claim and thereby unduly prejudices the party against whom the claim ultimately is asserted. To successfully defend on the basis of laches a defendant must demonstrate: (1) a delay in asserting a claim; (2) the delay was inexcusable; (3) there was undue prejudice to the party against whom the claim is asserted.

Here, Respondent states that Complainant waited eight years to object to Respondent's use of the PACKERS mark in his Domain Name. During the eight years, Respondent invested substantial time, effort and resources to develop his website, establish it as a go-to site for news, information and commentary, with a devoted type-in viewership of over 300,000 visitors last year alone, and linking domain names. Requiring Respondent to transfer the Domain Name would significantly prejudice him, allowing Complainant to destroy what Respondent and a small group of people created over the years.

Respondent alleges that Complainant knew of Respondent's website, as it contacted him previously in relation to alleged trademark and copyright use issues. Complainant first contacted Respondent in April 2014 regarding some material on Respondent's website. Complainant must have been aware of Respondent's website even prior to that because the NFL had contacted Respondent three years earlier. Respondent states that communications from the NFL and the Packers did not go unanswered. When they made requests for changes, Respondent complied. In reply to Complainant's arguments about when its staff attorney first became aware of the Domain Name in April 2014, Respondent questions why Complainant had not acted sooner, especially as there is a large group of individuals working for the Packers' front office. Respondent claims that the Vice President of Marketing and Fan Engagement, and many others working for Complainant, have known about Respondent's website for a long time, as the website is well known among the Packers family. Indeed, there have been over 1 million visits in recent years, more than 30 per cent typed in versus arriving via a search engine. Respondent argues there is no explanation as to why his site was not discovered sooner. Respondent alleges that, on information and belief, many others in the Packers' organization knew about it for many years, but Complainant acted only recently when it did not like the "Broads" page on Respondent's website and wanted censorship. Respondent states that the Packers allow many other websites with packers-derivative domain names to operate.

Further, Respondent contends that in its 2014 communication, Complainant did not raise any concerns with respect to Respondent's use of his Domain Name. Complainant only objected to use of its trademark in the Domain Name in its January 11, 2016 letter. Complainant provided no evidence that Respondent's Domain Name was in any way disrupting its business or confusing Internet users during the prior eight-year period. Respondent is not aware of any such confusion or disruption. Complainant has no credible explanation as to why it did not act sooner.

Respondent argues that even if the Panel does not deny the Complaint on the basis of laches, 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. Respondent asserts that lengthy delays in seeking legal or administrative remedies can have the effect

of eroding or undermining a complainant's arguments with respect to a respondent's rights or legitimate interests in a disputed domain name, or the respondent's alleged bad faith in registering and using it. Respondent claims the long delay also raises an inference that Complainant did not truly believe Respondent engaged in bad faith registration and use of the Domain Name.

B. Complainant's Contentions on Laches

Complainant contends that laches is inappropriate in this proceeding, as it is well settled that the doctrine of laches does not apply to proceedings initiated under the Policy. However, if the Panel finds that laches plays a role, Complainant states that the Panel should find that Complainant was diligent in addressing Respondent's infringement. Complainant submitted its Complaint within months of Respondent's recent refusal to communicate and cooperate with Complainant. Upon discovering Respondent's website in 2014, Complainant contacted Respondent regarding Respondent's website's violations of Complainant's trademark rights. Respondent replied to the letter and represented to Complainant that it had removed certain content from Respondent's website. In 2015, Complainant states that it discovered that Respondent had not made the changes as represented and thus Complainant again contacted Respondent regarding violations of Complainant's trademark rights. Respondent replied to the letter, requesting that Complainant "provide specifics." Thus, in 2016 Complainant sent Respondent a detailed cease and desist letter with specific demands. Respondent did not reply. Complainant sent another cease and desist letter shortly thereafter. Respondent, again, did not reply. Based on Respondent's non-responsiveness, Complainant decided to file a Complaint with the Center. Thus, Complainant submitted its Complaint within two years of first discovering Respondent's website and within two months of Respondent's sudden refusal to communicate.

Respondent points to communications from the NFL in an attempt to establish a longer period of time, but Respondent cannot impute the knowledge of one entity to an entirely different entity. Respondent should not be allowed to lead Complainant along with representations of cooperation and then raise laches during a proceeding that was initiated as a result of Respondent's own non-responsiveness. Moreover, Complainant states that despite Respondent's insinuations, Complainant aggressively enforces its trademark rights. Respondent asserts that "concurrent use of PACKERS marks in other domain names give an impression Complainant impliedly agrees to such use." While Respondent cites a number of domain names in support of this assertion, Respondent is not privy to the entire picture. Complainant is continuously sending out cease and desist letters to owners of domain names that contain variations on the PACKERS mark, including to a number of the owners of the domain names listed in the Response. In some cases, the owners enter into agreements with Complainant to avoid infringing on Complainant's trademark rights. Thus, Respondent's unsupported assertions of lack of Complainant's diligence with respect to third-party websites should be disregarded.

Finally, Complainant argues that the Panel should resist Respondent's attempt to import United States law regarding laches into this case. Prior UDRP panels have held that there is no real justification for importing local laws into the Center's proceedings and that doing so risks fragmenting the Policy into different systems.

C. Panel's Decision on Laches

The Panel has considered carefully the parties' arguments concerning laches. The Panel unanimously agrees with the view that the defense of laches does not apply in UDRP proceedings. The Policy offers a limited remedy to avoid future confusion in the marketplace and does not contemplate that such a remedy would be unavailable because of delay in initiating a case. See *Uline, Inc. v. Bhavna Babaria*, WIPO Case No. D2015-0462. This view accords with the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition ("WIPO Overview 2.0"), paragraph 4.10, which states:

"Panels have recognized that the doctrine or defense of laches as such does not generally apply under the UDRP, and that delay (by reference to the time of the relevant registration of the disputed domain name) in bringing a complaint does not of itself prevent a complainant from filing under the UDRP, or from being able to succeed under the UDRP, where a complainant can establish a case on the merits under the requisite three elements. Panels have noted that the remedies under the UDRP are injunctive

rather than compensatory in nature, and that a principal concern is to avoid ongoing or future confusion as to the source of communications, goods, or services.”

While not essential to its decision on the question of laches, the Panel also notes that Respondent has argued that laches should be applied because both parties are located in the United States and it is appropriate to apply that country’s legal principles in evaluating the parties’ rights and conduct. The Panel, however, considers that, except perhaps in limited circumstances not present in this case, there is no adequate justification for applying local laws in a case arising under the Policy and that such approach should be avoided wherever possible. As its name implies, the UDRP is intended to provide an international and uniform policy across all top-level domains for resolving disputes between trademarks owners and domain name registrants. As stated in *1066 Housing Association Ltd. v. Mr. D. Morgan*, WIPO Case No. D2007-1461, an approach applying local rules “risks the UDRP fragmenting into a series of different systems, where the outcome to each case would depend upon where exactly the parties happened to reside.” Moreover, as a policy matter, “the act of bringing local law into the assessment of the Policy when taken to its logical conclusion as a matter of practice undermines the ... goal of commercial certainty.” *Id.* This point is further supported because the Policy, on the one hand, and local laws (and related procedures) as to cybersquatting and trademark infringement, on the other hand, are different in several important respects, such that a set of facts might conclusively establish trademark infringement under domestic law, yet not be considered bad faith registration and use under the Policy, and vice versa. *Id.*

While the Panel decide that laches should not be applied in this case, the Panel, nevertheless, agrees with the position stated in WIPO Overview 2.0, paragraph 4.10, that “delay in bringing a complaint under the UDRP may make it more difficult for a complainant to establish its case on the merits, particularly in relation to the second and third elements requiring the complainant to establish that the respondent lacks rights and legitimate interests and that the respondent registered and used the domain name in bad faith.” See e.g., *Uline, Inc. v. Bhavna Babaria, supra* (“the Panel observes that lengthy delays in seeking legal or administrative remedies can often have the effect of eroding or undermining the complainant’s arguments with respect to the respondent’s rights or legitimate interests in a disputed domain name, or the respondent’s alleged bad faith in registering and using the domain name”).

6. Parties’ Contentions on the Merits

A. Complainant

(i) Identical or Confusingly Similar

Complainant states that its trademarks are famous and have significant goodwill, and for that reason, Complainant takes measures to protect the PACKERS brand and name. For example, Complainant’s official website states that the material on the website (including the PACKERS mark) is protected in part by trademark law and that any use of such material, other than personal, non-commercial, home use, is a violation of Complainant’s trademark rights. Complainant’s rights arose many decades prior to Respondent’s registration of the Domain Name. Complainant has been using the PACKERS mark since 1921. In contrast, Respondent registered the Domain Name on April 1, 2008. Complainant argues there is no doubt that Complainant’s rights in its marks supersede any alleged rights held by Respondent.

Complainant states that Respondent’s Domain Name is confusingly similar to Complainant’s PACKERS mark. Respondent’s Domain Name contains the entire PACKERS mark. Further, the “packers” portion of the Domain Name is the distinctive portion and is identical to Complainant’s PACKERS mark. The “total” portion of the Domain Name is minor and descriptive. Indeed, “total” is defined as “complete or absolute.” Thus, the Domain Name is best understood as a reference to the complete Packers. The addition of “total” does nothing to detract from the association likely to be made with the PACKERS mark. Complainant states that when a domain name incorporates a distinctive mark in its entirety, this creates sufficient similarity between the mark and the domain name to render it confusingly similar, regardless of other terms added to the domain name.

Accordingly, the Domain Name and the PACKERS mark are confusingly similar. For this reason, the United States Patent and Trademark Office refused to register the mark, TOTAL PACKERS, because it is confusingly similar to the PACKERS mark.

Complainant states that Respondent may point to the disclaimer hidden within its website as evidence that there is no confusing similarity between the Domain Name and the PACKERS mark, but the use of a disclaimer is irrelevant to the confusing similarity analysis. Moreover, Complainant in its Supplemental Filing argues that the Panel should disregard Respondent's assertions regarding its alleged disclaimer because Respondent changed it at least twice after filing the Complaint (to include crude, vulgar, and threatening language) and could easily change it again. Even if the disclaimer might dispel some confusion, in fact it does not, and it could be altered or even completely removed. Thus, the Panel should disregard the disclaimer for the confusing similarity analysis.

Complainant also contends in its Supplemental Filing that Respondent inappropriately relies on other domain names that incorporate the term "total" to support the assertion that the public is accustomed to seeing nonofficial domain names for NFL teams incorporating that term. Complainant contends that this assertion should be disregarded as speculation. Respondent offers no support for what the public is accustomed to seeing. Moreover, Respondent's own materials undermine its position. Respondent lists the domain name <totalsteelers.com> in support of its assertion; however, the website at this domain name is another example of Respondent improperly creating a false association with a professional football team by using the football team's brand, name, and logo. The Steelers maintain their official website at "www.steelers.com" and emblazon their website with the official black and yellow colors and three-diamond logo. The website found at "www.totalsteelers.com" also uses the Steelers' black and yellow colors and includes the three-diamond logo. The website states "Total Steelers covers Pittsburgh Steelers football-- the players, the coaches, fames, business and just about anything else related to the Pittsburgh Steelers." The website does not contain a disclaimer. The About page of the website lists "Monty" as a co-founder of Total Steelers. According to the website, Monty is "a Green Bay Packers fan" and "currently lives in Los Angeles, via Wisconsin, writes about sports and looks at pictures of naked women." Thus, according to Respondent's own materials, Respondent has a pattern of improperly creating a false association with a professional football team by using the football team's brand, name, and logo.

Complainant asserts that the other domain names listed by Respondent are similarly unavailing. At least three of the websites at these domain names appear to be filled by auto-generated content and thus are presumably owned by cyber-squatters. This shows that domain names that consist of <total + name of professional football team> are desirable because they are an easy way to create an association with the team. Complainant maintains this supports the proposition that "total" is a descriptive term.

(ii) Rights or Legitimate Interests

Complainant contends that Respondent has no rights or legitimate interests in the Domain Name. Respondent uses it for a website that purportedly provides "news, analysis, commentary, video, gossip and humor" related to the Packers. While Respondent may have rights or interests in providing information about the Packers, these do not convey a right to use the PACKERS mark in a confusingly similar manner for commercial gain.

Complainant contends that Respondent does not use the Domain Name for a noncommercial purpose. The website linked to the Domain Name uses pop-up advertisements that are powered by Spoutable, a company that specializes in monetizing websites and generating revenue for website publishers. Accordingly, Complainant contends that Respondent cannot claim that it is entitled to the Domain Name for fair and noncommercial criticism or commentary.

However, even if Respondent uses the Domain Name for a genuine, noncommercial purpose, Complainant states that Respondent still would not have a legitimate interest in it. While Respondent may have a legitimate interest in providing information about the Packers, this does not equate to an interest in a Domain Name that is confusingly similar to the PACKERS mark. UDRP panels have repeatedly distinguished

between legitimate interests in providing information and illegitimate interests in confusingly similar domain names. Thus, a respondent may not use a trademark within a domain name to suggest a false connection to the trademark holder. Regardless of the content of their websites, respondents that use trademarks within domain names are making a false representation to the world and engaging in impersonation. In essence, these respondents are unfairly trading on the brand recognition and goodwill garnered by the trademarks to attract viewers. Respondents are not entitled to make these false representations, even if it is apparent upon entering the website that the trademark holder is not associated with the website.

Here, Respondent is using the Domain Name that falsely conveys a connection with the Packers. Considering Respondent uses it for a website that relates to the Packers, it is reasonable to assume that Respondent knowingly and deliberately chose the Domain Name because it includes the PACKERS mark. Due to the inclusion of the PACKERS mark, viewers of the website at the Domain Name will reasonably but mistakenly assume that the website is somehow affiliated and endorsed by Complainant. While Respondent may have a legitimate interest in providing information about the Packers, Respondent has no such legitimate interest in unfairly trading on the brand recognition and goodwill associated with Complainant's marks.

Moreover, it is not immediately apparent when entering Respondent's website that it is not associated with Complainant. Respondent's website bears a strong similarity to Complainant's official website. For example, both websites emblazon their headers with "PACKERS" in bold, capital letters. And both websites use the Packers' official green and gold color scheme in their headers and backgrounds. Respondent has chosen to mimic Complainant's official website in a way that is likely to confuse and deceive viewers into believing that Respondent's website is somehow associated with Complainant. Respondent does not have any legitimate interest in carrying out such deceit.

Complainant states that Respondent may point to the disclaimer hidden within its website as evidence that Respondent does not seek to make an association with Complainant, but the disclaimer is too little too late. Respondent's disclaimer is only reached by clicking on a separate link from the website's main page. Viewers of Respondent's website could spend hours on the website and never enter the disclaimer page. Respondent's use of a disclaimer does not dispel the initial confusion that results from its use of the Domain Name.

In its Supplemental Filing, Complainant states that Respondent misrepresents its past actions to the Panel by stating "Respondent never offered the domain name for sale." Complainant contends this is false. On July 29, 2016, counsel for Respondent called counsel for Complainant to talk about settling the dispute between the parties. During the talks, counsel for Respondent proposed that Complainant buy the website and pay to shut it down. Counsel for Respondent stated that Respondent kept statistics on the number of visits the website receives and could provide that information if Complainant was interested. On August 2, 2016, Counsel for Complainant called counsel for Respondent to inform Respondent that Complainant was not interested in buying the website. At that point, counsel for Respondent asserted that Respondent was not a cyber-squatter and requested that Complainant not use Respondent's offer for sale against Respondent in the proceeding to show bad faith or exploitation of the Domain Name. Counsel for Complainant agreed and intended to keep that agreement, until Respondent misrepresented the facts to the Panel by stating in his Response that "Respondent never offered the domain name for sale."

Complainant also contends in its Supplemental Submission that Respondent's newly submitted materials further support that Respondent's website is commercial in nature and Respondent is not entitled to the Domain Name for fair and noncommercial criticism or commentary. According to Complainant, Respondent admits that the website brings in money from ad revenue, and this is unsurprising, considering Respondent claims to have experience in testing, tracking, and optimizing pay-per-click ad campaigns. Respondent asserts that the revenue generated by the website "helps cover operating costs, including paying for hosting, writers and use of some copyrighted images." Thus, it is clear that Respondent is actively attempting to generate revenue and, in fact, is successfully generating at least some revenue from the website.

Complainant also contends in its Supplemental Filing that Respondent misrepresents that it removed the "Broads" page from Respondent's site. Respondent stated in its Response that "I realized that this part of the website, primarily about the players' wives and girlfriends, was not being interpreted the way I originally intended, so I have since removed it." However, Complainant states that Respondent has not removed the page; rather, Respondent has merely renamed the page "WAGS & SUCH," ostensibly short for "Wives and Girlfriends." The "WAGS & SUCH" page still has the same content that the "Broads" page did, including pictures of women in various stages of undress. The "WAGS & SUCH" page links to archived content from the "Broads" page. Complainant argues that Respondent's attempt to repackage the same content should be seen for what it is, bad faith.

(iii) Registered and Used in Bad Faith

Complainant contends that Respondent registered the Domain Name and is using it in bad faith. Complainant argues that a respondent registers a domain name in bad faith when it knows about a complainant's trademark and reputation and then deliberately registers a domain name that is confusingly similar to the mark to trade off on that reputation by creating a false association between that domain name and the complainant's mark, so as to attract Internet users seeking the complainant or its authorized site.

Complainant states that Respondent deliberately chose the Domain Name because it is confusingly similar to Complainant's PACKERS mark. Through this similarity, Respondent creates a false association with Complainant, which unfairly attracts viewers to Respondent's website. When Internet users search for information on the Packers, they could mistakenly assume that the Domain Name is associated with Complainant and perhaps even endorsed by Complainant. Respondent could have chosen a different domain name to provide news, analysis, commentary, video, gossip and humor related to the Packers. However, it did not and this behavior is evidence of bad faith.

Further, because the website linked to Domain Name bears a striking resemblance to Complainant's official website, viewers may not come to realize that the information contained on the website is not endorsed by Complainant. While some of the articles featured on the website are critical of Complainant, others are not and resemble legitimate articles. Because these news-like articles appear on a website linked to the Domain Name, they appear to bear Complainant's stamp of approval, when in fact they do not. Complainant has no control over the content of this information, even though the information unfairly enjoys Complainant's imprimatur.

Complainant states that Respondent does very little to disassociate itself from Complainant. Respondent has a disclaimer, but it is not featured on the website's homepage and can only be accessed through a separate link. Moreover, Respondent softens the disclaimer by associating itself with news organizations that are affiliated with Complainant. While the disclaimer states that Respondent "is not affiliated with the Green Bay Packers," it claims to be "a news and entertainment organization that reports on the Green Bay Packers ... much the same way the Green Bay Press-Gazette does." Further, while the disclaimer provides a small link to Complainant's official website, Respondent's contact page does not. Thus, viewers could visit the website, read several articles, think that they are associated with Complainant, and then use the contact page in a futile attempt to contact Complainant, all while never reading the hidden disclaimer.

In addition, Complainant states that Respondent's website features sexually-charged photographs accompanied by lascivious commentary. Because these photographs and commentary are directly associated with Complainant's PACKERS mark, Respondent tarnishes Complainant's goodwill. This tarnishment is further evidence of bad faith. Respondent's website had included a link to a page entitled "Broads," which features articles that includes photographs of women in swimsuits, underwear, and various stages of undress. Respondent also allows viewers to comment on the photographs, with no apparent oversight for content. Because these "articles" appear on a website using the Domain Name they appear to bear Complainant's stamp of approval, when they do not. Respondent's association of sexually-charged content with Complainant's PACKERS mark threatens Complainant's goodwill. Complainant states it has spent decades and enormous amounts of resources cultivating a family-oriented image and building goodwill among its fan base, including women. By way of example, unlike most professional American football

teams, Complainant has elected not to maintain a professional cheerleading squad, but rather invites cheerleaders from local universities to appear at home games. According to Complainant's official website, Complainant discontinued using professional cheerleaders due to fan indifference. Respondent's unwanted association with sexually-charged content threatens to undo Complainant's efforts.

Complainant also contends that Respondent has engaged in a campaign of secrecy and hidden its true ownership from the public. Respondent has chosen to use a proxy for its administrator's contact information and has provided no contact information for its owner, which has presented problems for Complainant in sending cease and desist letters. Finally, Respondent has failed to respond to cease and desist letters dated January 2016, February 2016, and May 2016. This is yet another indication of Respondent's bad faith.

In its Supplemental Filing, Complainant also asserts that Respondent's statement that it never tried to sell the Domain Name is not true, as described above. Complainant also rebuts Respondent's claims that there is no pattern of conduct of Respondent registering other domain names that include trademarks. Respondent's own materials show that Respondent co-founded at least one other website, "www.totalsteelers.com", that uses another professional football team's name. In effect, Respondent has founded a string of websites that suggest affiliation with or sponsorship by professional football teams in the NFL. Respondent admittedly generates revenue from at least one of these websites.

B. Respondent

Respondent states that he is not a cybersquatter. Respondent has continuously used the Domain Name since its registration on April 1, 2008. Respondent claims the Internet presence of his website has expanded, and it had over 1 million visits last year, 30 percent of which were type-in traffic. Despite such open and notorious use, Respondent states that Complainant did not raise any issue with the Domain Name until 2016. When Complainant contacted Respondent two years prior, Complainant did not object to use of its trademark in Respondent's Domain Name. Respondent has legitimate interests in the Domain Name and in continuing uninterrupted operation of his sports news website, which is primarily noncommercial in nature. Respondent made some changes to the website before this proceeding and has always operated the Domain Name in good faith. Complainant waited too long to bring its Complaint.

(i) Identical or Confusingly Similar

Respondent contends that the Domain Name is not identical or confusingly similar to Complainant's trademark. As stated in the WIPO Overview 2.0, paragraph 1.2, the first element of the UDRP serves essentially as a standing requirement: To determine likelihood of confusion, panels compare the trademark and the domain name; while some panels rely on a straightforward visual or aural comparison, others require that the complainant show risk of Internet users actually confusing the domain name with complainant; and panels also consider factors such as overall impression, the distinguishing value (if any) of any additional terms, and whether an Internet user would necessarily comprehend such distinguishing value vis-à-vis the relevant mark.

Respondent urges that unfamiliar Internet users seeking information about the Green Bay Packers will not be led to believe the Domain Name is Complainant's official website. The choice of words, style and format of the displayed information differentiates Respondent's website from the official website. Further, Respondent's Domain Name is not identical to Complainant's mark because it contains the term "total" as a prefix to the term "packers," unlike identical domain names in other UDRP cases. Adding this word to the trademark in the Domain Name causes the entire name to be sufficiently distinguishable from Complainant's mark.

Respondent asserts that Complainant is incorrect in its classification of the word "total" as being "purely descriptive." Respondent claims it is distinctive and the public is accustomed to seeing nonofficial domain names for NFL teams incorporating the "total" term (e.g., <totaltitans.com> and <totalsteelers.com>). Moreover, including the term "total" at the beginning of the Domain Name differentiates it from other domain

names that not only incorporate the words “packer” or “packers,” but also begin with those words – e.g., compare the domain names (<green-bay-packer.com>; <dailypacker.com>; <greenbaypackerslovers.com>; <greenbaypackernation.com>; <greenbaypackers.de>; <gbpackersman.com>) and the domain names (<packersnews.net>; <packernet.com>; <packersnews.com>; <packersnotes.com>; <packerstalk.com>; <packersgab.com>; <packerspress.com>; <packershome.com>; <packerforum.com>; <packer.com>; <packernation.com>; <packershistory.net>; <packersfanpodcast.com>; <packersgame.net>; and <packersguru.com>).

Respondent’s “About” webpage states why the website linked to the Domain Name was created and who is behind it. Respondent contends that there is no likelihood of confusion if appropriate disclaimers are contained within the site, where there is evidence of a *bona fide* registration of a domain name intended to operate as a genuine fan site supporting the football club. The disclaimer on Respondent’s site, accessible on every page, clearly states the website is not affiliated with the Green Bay Packers. The first sentence reads: “Total Packers (totalpackers.com) is not affiliated with the Green Bay Packers.”

Respondent in its Supplemental Submission states that even though there have been several versions of Respondent’s disclaimers, all versions make one thing clear: Respondent is not affiliated with or sponsored by the team. The disclaimers are helpful to dispel even the possibility of any appreciable confusion. Respondent also re-emphasizes that there is no evidence of actual confusion, although Respondent has had his website for over eight years.

Respondent states that the potential degree of initial confusion needs to be considered in the particular factual circumstances of the case while keeping in mind the Policy’s aims. When users search for “packers” or “packers news” using the Google search engine, Respondent’s reference appears on pages 4 and 5 of the results, respectively. The search results display the short description as “Total Packers is the No. 1 site for Green Bay Packers news, commentary, analysis and even a little humor,” while the description for the official site on the first page of the Google search results shows “Packers.com, the official website of the Green Bay Packers.”

Respondent states that if the Panel determines that Complainant satisfies this first UDRP element, which it should not, the Panel can still find that this presumption is rebutted since the Domain Name does not appear to have caused any business disruption or confusion suffered by Complainant. Complainant has provided no evidence or any showing that its business was disrupted or that there was any confusion as a result of Respondent’s Domain Name.

(ii) Rights or Legitimate Interests

Respondent states he is using the website as a free speech tool, making a legitimate noncommercial or fair use of the Domain Name by offering sports news and critical commentary related to the Green Bay Packers team. Irrespective of whether the Domain Name as such connotes criticism, Respondent has a legitimate interest in using the trademark as part of the Domain Name for a criticism site if such use is fair and noncommercial. In its Complaint, Complainant acknowledges that “some of the ‘articles’ featured on the website are critical of Complainant.” Respondent states his website also provides some news of a purely informational nature, which makes it similar to other news reporting websites that incorporate Complainant’s trademarks as part of their domain names. Complainant acknowledged in its Complaint that some of Respondent’s articles “resemble legitimate new[s] articles.” Respondent also expresses complimentary opinions about the team, as a fan site. According to WIPO Overview 2.0, paragraph 2.5, many of the considerations used by UDRP panels in relation to criticism sites are also applied by panels in relation to fan or tribute sites. Here, Respondent has been using the website continuously as a fan site. Moreover, Respondent’s Domain Name differs from Complainant’s trademark while in a number of previous UDRP cases involving fan sites, the disputed domain names that were identical to the respective trademarks.

Respondent states that if the respondent is a domain name speculator trying to sell the domain name while claiming to use it as a criticism site, the trademark owner will prevail. Here, however, Respondent has been continuously using the Domain Name since its registration. In over eight years of operating the Domain

Name, Respondent states he has never offered it for sale.

Respondent states that he is not using his website for commercial purposes. For a fan site to generate rights or legitimate interests, it has to be active and noncommercial, although some UDRP panels have noted a degree of incidental commercial activity may be permissible in certain circumstances. Respondent has been paying for expenses associated with running his website from his own personal funds, with a small portion of advertising revenue helping to cover some expenses.

Respondent emphasizes that his use of the Domain Name does not affect Complainant's use of its trademark. Respondent acknowledges that a domain name registrant may not have a legitimate interest in a domain name in cases where, because the domain name is identical to the trademark, it prevents the trademark holder from exercising its rights and managing its presence on the Internet. However, Respondent's Domain Name is not identical to Complainant's trademark and Complainant has not stated how it is adversely affected by Respondent's Domain Name.

Respondent also contends that he is not intending to confuse anyone or imply affiliation. The short description of Respondent's website that comes up in search engine results clearly states what the website is and differentiates it from Complainant's official website. Respondent is not misleadingly diverting consumers by identifying himself as the Packers' official website or suggesting a connection to or affiliation with the team. Respondent has never competed with or tried to steer any business from Complainant. Moreover, Respondent's "About" and "Disclaimer" pages are accessible on every page of Respondent's website, stating that the site is not associated or affiliated with the Green Bay Packers. Respondent is outspoken about the type of information visitors can find on his website and the purpose the site serves. There is no likelihood of confusion if appropriate disclaimers are contained within the site. Respondent claims his website is well known and recognized for what it is. Respondent's website is commonly known, respected and liked (within the meaning of paragraph 4(c)(ii) of the Policy) by its Domain Name. Only last year Respondent had over a million visitors with 30 per cent of which as type-in traffic.

Respondent also contends that he is not trying to tarnish Complainant's trademark. Tarnishment in this context refers to such unseemly conduct as linking unrelated pornographic, violent or drug-related images or information to an otherwise wholesome mark. While Complainant states in the Complaint that it tries to cultivate a family-oriented image and build goodwill among its fan base, Respondent did not intend to or actually tarnish Green Bay Packers mark by putting up a webpage titled "Broads." While that page contained images of women in revealing clothes, those images were not comparable to pornographic, violent or drug-related images. Moreover, Green Bay Packers players are already mentioned in the news in relation to sexual assault charges or in other commentaries that involve the topic of sex. Nevertheless, seeing how this page was perceived, although Respondent disagrees with Complainant's categorization, Respondent has since removed it.

(iii) Registered and Used in Bad Faith

Respondent states he did not register the Domain Name with intent to sell it later to Green Bay Packers or any other entity for profit. Respondent contends that a case cited by Complainant's is inapposite, *David Gilmour, David Gilmour Music Limited and David Gilmour Music Overseas Limited v. Ermanno Cenicolla*, WIPO Case No. D2000-1459 ("*Gilmour*"). In *Gilmour*, the respondent registered several domain names, including other domain names comprised of celebrity names, the domain name in question was identical to the complainant's name, the website at the domain name was not operational, and the respondent was offering the domain name for sale. Here, Respondent never tried to sell his Domain Name and has been using it continuously. In response to Complainant's allegation that Respondent offered to sell the Domain Name during settlement discussions, Respondent states that the statement in his declaration, that he never offered to sell the Domain Name, is true and not misleading. Respondent's attorney merely suggested, in the context of settlement discussions exploring many subjects, that the Packers could make an offer if they saw it as a way to resolve the dispute. This does not establish bad faith, or that Respondent's interest in the Domain Name was not legitimate.

Respondent did not register the Domain Name to prevent the Green Bay Packers from registering it. Respondent acknowledges that while registering a domain name that includes a trademark within it coupled with a pattern of similar conduct serves as evidence of bad faith, here, Respondent registered the Domain Name because it was available and it properly suggested the type of information Respondent was intending to provide on his website. Respondent states his intent in registering the Domain Name was to provide information and to share his opinions and commentaries. Complainant did not point to any pattern of conduct to demonstrate that Respondent engages in this type of registration regularly.

Respondent contends that the Domain Name has had no impact on Complainant's business. While Respondent recognizes that bad faith is present where a domain name holder registers a domain name to disrupt a competitor's business, Respondent did not register the Domain Name to disrupt the team or negatively affect its business. Respondent provides informational and analytical commentaries, has a personal stake in the team, and is a genuine fan.

Respondent claims he is not creating a false association with Complainant. Evidence of bad faith is present where the domain name holder attracts users to its website, for commercial gain, by creating confusion or implying affiliation with the trademark owner. Here, Respondent is not attempting to trick users. When users search for "packers" or "packers news," the website linked to the Domain Name comes up on pages 4 and 5 of the search results. A short description in search results for Respondent's website differentiates it from the official website. Once a user enters the website, they can see both "Disclaimer" and "About" links, accessible on every page explaining that the website is "not affiliated with the Green Bay Packers." Respondent contends that a disclaimer, especially if it is sufficiently clear and prominent, may sometimes be found to support other factors indicating good faith or legitimate interest. In addition Respondent's "About" page makes it clear for every football aficionado that "Total Packers doesn't pull any punches. We are outspoken. We are entertaining. Sometimes, we are crass. But most of all, we are passionate about the Green Bay Packers."

Respondent states that Complainant is incorrect in suggesting that Respondent "has engaged in a campaign of secrecy and has hidden its true ownership from the public." Respondent had his name displayed on the Domain Name's registration since the beginning until 2016. After the Complaint was filed, his name became visible again. The "About" page lists the names of people involved and other identifying information, including biographical facts about the two co-founders, as well as a Twitter account for one of them. The use of a privacy service, in and of itself, is not an indication of bad faith. UDRP panels have found bad faith where other factors were present in addition to the use of privacy service. Respondent's contact information was known to the Registrar, was listed on his "About" page, and he directly communicated over the phone with Complainant.

7. Discussion and Findings

To succeed in its claim, Complainant must demonstrate that each of the three elements enumerated in paragraph 4(a) of the Policy have been satisfied. These elements are that:

- (i) the Domain Name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights;
- (ii) Respondent has no rights to or legitimate interests in respect of the Domain Name; and
- (iii) Respondent has registered and is using the Domain Name in bad faith.

A. Identical or Confusingly Similar

The Panel must determine whether the Domain Name is identical or confusingly similar to a trademark in which Complainant has rights.

Complainant has demonstrated that it has registered rights, as well as strong reputation and goodwill, in its PACKERS trademark, which has been in use since 1921 and has received widespread promotion and coverage for many years.

While Respondent has not attempted to dispute Complainant's ownership and rights in the PACKERS trademarks, Respondent has provided a number of reasons to argue the Domain Name is not confusingly similar to Complainant's PACKERS mark: the term "total" as a prefix to the term "packers" differentiates the Domain Name from the mark, especially as this term is distinctive and the public is accustomed to seeing nonofficial domain names for NFL teams incorporating this term; the choice of words, style and format of the information on Respondent's website differentiates it from Complainant's official website; Respondent's "About" and "Disclaimer" webpages state that Respondent's website is not affiliated with the Packers; the potential degree of initial confusion needs to be considered in the particular factual circumstances of the case; and the Domain Name does not appear to have caused any business disruption or confusion suffered by Complainant.

The Panel determines that, for purposes of determining whether the Domain Name is confusingly similar to Complainant's PACKERS mark under the first element of paragraph 4(a) of the Policy, the test of identity or confusing similarity Policy is confined to a comparison of the trademark and the disputed domain name. As stated in WIPO Overview 2.0, paragraph 1.2:

"The first element of the UDRP serves essentially as a standing requirement. The threshold test for confusing similarity under the UDRP involves a comparison between the trademark and the domain name itself to determine likelihood of Internet user confusion. In order to satisfy this test, the relevant trademark would generally need to be recognizable as such within the domain name, with the addition of common, dictionary, descriptive, or negative terms typically being regarded as insufficient to prevent threshold Internet user confusion. Application of the confusing similarity test under the UDRP would typically involve a straightforward visual or aural comparison of the trademark with the alphanumeric string in the domain name...."

The issue in the analysis of the first factor thus is whether the alphanumeric string comprising the Domain Name is identical to Complainant's mark or sufficiently approximates it, visually, phonetically, in meaning or overall impression, so that the Domain Name on its face is confusingly similar to Complainant's mark. It is sufficient in this respect that the Domain Name incorporates the trademark in such a way as people will wonder whether the Domain Name refers to or is associated in some way with Complainant. See, *Red Bull GmbH v. Paul Battista*, WIPO Case No. D2010-0353 and *Research in Motion Limited v. One Star Global LLC*, WIPO Case No. D2009-0227.

Here, the Panel finds that the Domain Name incorporates the entirety of Complainant's well-known PACKERS mark. The term "total", even when placed in the first position before Complainant's mark, does not sufficiently distinguish the Domain Name from the mark to avoid confusing similarity.

Accordingly, Complainant has satisfied the first element of the Policy.

B. Rights or Legitimate Interests

Pursuant to paragraph 4(a)(ii) of the Policy, Complainant must prove that Respondent has no rights or legitimate interests in respect of the Domain Name. A complainant is normally required to make out a *prima facie* case that the respondent lacks rights or legitimate interests. Once such *prima facie* case is made, the respondent carries the burden of demonstrating rights or legitimate interests in the domain name. If the respondent fails to do so, a complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy. The overall burden of proof, however, remains with the complainant.

Here, the Panel finds that Complainant has made out a *prima facie* case. Complainant contends that Respondent deliberately chose the Domain Name because it includes the PACKERS mark and falsely conveys a connection with the Packers; that due to the inclusion of the PACKERS mark, viewers of the

Domain Name will reasonably but mistakenly assume that Respondent's website is somehow affiliated with or endorsed by Complainant; that while Respondent may have a legitimate interest in providing information about the Packers, Respondent has no legitimate interest in unfairly trading on the brand recognition and goodwill associated with Complainant's marks; that Respondent's website bears a strong similarity to Complainant's official website and is likely to confuse viewers into believing that Respondent's website is somehow associated with Complainant; that Respondent's disclaimer is insufficient to prevent this confusion; that Respondent does not use the Domain Name for a noncommercial purpose because the website at the Domain Name uses pop-up advertisements powered by Spoutable, a company specializing in monetizing websites; and that Respondent therefore cannot claim it is entitled to the Domain Name for fair use purposes and noncommercial criticism and commentary.

In response, Respondent has gone a long way towards rebutting Complainant's *prima facie* showing to demonstrate rights or legitimate interests in the Domain Name. Respondent states that he has used the website linked to the Domain Name as a fan site, making legitimate noncommercial or fair use of the Domain Name by offering news and critical commentary related to the Packers. Respondent points to his track record of continuous use of the Domain Name as a fan site since its registration in 2008, and that Complainant's long delay in seeking relief, if not resulting in dismissal of the Complaint under the doctrine of laches, is still relevant to the question of whether Respondent has been able to develop rights or legitimate interests. Respondent claims that his website is commonly known by its Domain Name. Respondent also emphasizes that his use of the Domain Name does not affect Complainant's use of its trademark, particularly as Domain Name is not identical to Complainant's mark and Complainant has not shown that it is adversely affected by Respondent's Domain Name. Respondent also contends that he did not intend to confuse anyone, that Complainant has not provided evidence of actual confusion, and that his website's "About" and "Disclaimer" pages, accessible from every page of the site, indicate that the site is unaffiliated with the Packers. Respondent states that he has been paying for expenses associated with running his website from his own personal funds, with a small portion of advertising revenue helping to cover some expenses, and that he has never sold any merchandise or tried to gain business from Complainant. Moreover, Respondent states that in over eight years of operating the Domain Name, he has never offered to sell it (except, as disclosed through the parties' Supplemental Filings, in settlement discussions with Complainant once this dispute arose). Respondent also contends that the website and its content does not tarnish Complainant's trademark. In view of these contentions, Respondent has invoked paragraphs 4(c)(ii) and (iii) of the Policy in support of his position that he has developed rights or legitimate interests in the Domain Name:

"(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are 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."

The Panel observes that this case presents a close call. There seems to be no real dispute that Respondent registered and is using the Domain Name in connection with a genuine and active fan site (providing some criticism as well) for the Packers. Respondent has used the Domain Name for this purpose since it was registered in April 2008. There is no claim by Complainant (or evidence in the record) that the site is merely a pretext for commercial gain. Respondent describes himself (and his associates supporting the site) as devoted Packers fans. Respondent's site demonstrates extensive development and a high amount of original content, sustained over time. However, Complainant has alleged that Respondent's use of the Domain Name linked to his website does not qualify as noncommercial or fair use, because the website uses pop-up advertisements. In his sworn statement, Respondent states that he personally covered all of the expenses related to setting up his website back in 2008 and since then, has been paying for the expenses associated with running the website and devoting his personal time, effort and resources to it. However, there is also evidence in the record – admitted by Respondent in the same sworn statement – that at least in recent years, his site has generated revenue (USD 10,000 this last year) through pop-up advertisements, which he states has been used to cover operating costs.

In view of all of the above circumstances, the Panel considers that the question of rights or legitimate interests essentially turns on the following two issues:

- (i) Does the advertising revenue generated by Respondent's website, which appears to have been minimal in early years (and not the aim of the website), but more substantial in recent years, preclude a finding of Respondent's claimed noncommercial and fair use of the Domain Name?
- (ii) Does Respondent's use of the Domain Name as a fan site for approximately eight years (and for more than 6 years before being first contacted by Complainant's representative by letter of April 24, 2014, with the Domain Name registered on April 1, 2008) provide a basis for recognizing that Respondent may have developed a right or legitimate interest in use of the Domain Name?

Here, on the balance of the probabilities, the Panel concludes that Respondent's website, although primarily a genuine fan site providing news and commentary about the Packers, does not qualify as a noncommercial (fan) site. A review of Internet Archive entries for Respondent's site – there have been 156 captures for Respondent's site between September 26, 2008 and October 12, 2016 – shows that pop-up ads were present on the site during much of the time it has operated, and that for a short period there was also a link to the "Total Packers Store," leading to the "Total Packers' Green Bay Packers Shop" powered by Amazon.com. Further, even if we accept that the level of advertising revenue generated recently (said to be approximately USD 10,000 this past year) does not cover the complete costs of running the site, this amount is still a substantial sum. Further, on July 27, 2015, prior to the dispute, Respondent filed an application for the mark, TOTAL PACKERS, declaring a date of first use in commerce of April 18, 2008. While Respondent subsequently abandoned this application on May 16, 2016, following its rejection by the USPTO, it nonetheless provides evidence of Respondent's own views on the issue of commercial use.

Having decided that Respondent's website does not qualify as a noncommercial (fan) site under the Policy, the second key issue remains: whether Respondent's use of the Domain Name as a fan site for approximately eight years (and for more than 6 years before being contacted by Complainant's representative) provides a basis for finding a right or legitimate interest in its use. As noted in Section 5 (Laches), the Panel considers that lengthy delay in seeking legal or administrative remedies may have the effect of undermining a complainant's arguments with respect to the respondent's rights or legitimate interests in a domain name, or the respondent's alleged bad faith in registering and using it. See *Uline, Inc. v. Bhavna Babaria, supra*.

Here, the Panel determines, in view of the particular circumstances of this case, that Respondent's use of the Domain Name (for a period of eight years (and 6 years before any contact from Complainant)) in connection with a genuine fan site, providing news and commentary about the Packers, has given rise to a legitimate interest in the Domain Name. Respondent's website is well-established and the evidence indicates that it has a large following. Complainant has not provided evidence of any serious damage to itself or the Packers resulting from Respondent's use of the Domain Name. Prior to this dispute, Respondent did not attempt to sell the Domain Name during the eight years he used it, and his website does not compete with or seek to take business away from Complainant. While Respondent's website does not qualify as noncommercial, the primary aim of the website has been to provide news and critical commentary related to the Packers. Respondent's "About" and "Disclaimer" webpages, with prominent links on the homepage of Respondent's website, although containing some strong language, have always made clear that Respondent's website is unaffiliated with Complainant. To the extent that there was potential for confusion between Complainant and its PACKERS mark, on the one hand, and Respondent's website, on the other hand, Respondent's development and use of his website, establishing an association with the Total Packer name as a fan site, has served to distinguish the site from Complainant and its marks.

The Panel also observes for completeness that Respondent challenged why Complainant had not acted sooner, alleging that the website has been known for a long time among members of Complainant's front office and the Packers' community. While Complainant's attorney indicated that he discovered the website linked to the Domain Name in early 2014, the Panel is persuaded, on the balance of the probabilities, that Complainant's organization would likely have been aware of the site well before that date. Moreover, while a

somewhat fine point, Complainant's first cease and desist letter sent in April 2014, while generally objecting to use of Complainant's trademarks in the content of Respondent's website, did not object to use of the Domain Name; objection to use of the Domain Name was not made until January 11, 2016.

The Panel recalls that the overall burden of proof for this second element of the Policy remains with Complainant. In view of all of the above circumstances, the Panel concludes that Complainant has not demonstrated, on the balance of the probabilities, that Respondent lacks any right or legitimate interest in respect of the Domain Name.

Accordingly, Complainant has failed to satisfy the second element under paragraph 4(a) of the Policy.

C. Registered and Used in Bad Faith

As noted above, to succeed on its claim Complainant must demonstrate that each of the three elements in paragraph 4(a) of the Policy has been satisfied. Given the Panel's findings that Complainant has failed to demonstrate Respondent lacks any right or legitimate interest in respect of the Domain Name, the Panel considers that it is not strictly necessary to consider the issue of registration and use in bad faith. The Panel finally notes that the parties remain free to pursue their claims, including as to possible trademark infringement or dilution / tarnishment in the courts.

8. Decision

For the foregoing reasons, the Complaint is denied.

Christopher S. Gibson
Presiding Panelist

Matthew S. Harris
Panelist

W. Scott Blackmer
Panelist
Date: October 21, 2016