

**National Arbitration Forum
Uniform Rapid Suspension System Response**

**HOLA S.L. v. North Sound Names et al.
FA1407001570171**

Respondent requests that the Response be submitted for determination in accordance with the URS Procedure, the URS Rules and the Provider's URS Supplemental Rules.

Respondent (URS Proc. 5.4.1)

Name: Domain Administrator
Business: North Sound Names
Address: 30485 Seven Mile Beach
Grand Cayman, II KY11202
KY
Primary Phone: +1.3457475465
E-Mail: contact@northsoundnames.com

Name: As Noted
Business: As noted in complaint
Address: as noted in complaint
as noted 999999
Cayman Islands
Primary Phone: 9999999
E-Mail: as@noted.in.complaint

Respondent's Authorized Representative(s) (URS Rule. 5(a)(i))

Name: John Berryhill
Address: 204 East Chester Pike, Suite 4
Ridley Park, PA 19078
USA
Primary Phone: 610-565-5601
Fax: 267-386-8115
E-Mail: john@johnberryhill.com

Name: John Berryhill
Address: 204 East Chester Pike, Suite 4
Ridley Park, PA 19078
United States of America
Primary Phone: 610-565-5601
Fax: 267-386-8115
E-Mail: john@johnberryhill.com

Specific Response to Complainant's allegations, including Defenses (URS Proc. 5.4.2 and 5.4.3)

[URS 1.2.6.1] The registered domain name(s) is/are identical or confusingly similar to a word mark:
(i) for which the Complainant holds a valid national or regional registration and that is in current use; or
(ii) that has been validated through court proceedings; or
(iii) that is specifically protected by a statute or treaty in effect at the time the URS complaint is filed.

Response: Due to formatting issues encountered with the NAF text-entry system, the full text of this Response is also

attached in .pdf format as Exhibit D hereto. Complainant does not show the mark is in current use. The Trademark Clearinghouse (TMCH) standard of "specimen of use" is unknown, and the specimen is not accessible. When the URS was formulated, it was assumed that the TMCH specimen would be accessible via the TMCH record. While indeed the URS permits TMCH record to be used as evidence of use, the TMCH record itself does not show what the specimen may have been or indeed how the Complainant claims to use the mark for the recited services. As noted in URS proceeding NAF FA1405001558494 <finn.sexy> "Complainant has provided a copy of a Trademark Clearinghouse document stating that proof of use is 'valid' and that an attached Declaration and a single sample have been uploaded. The attachments themselves have not been provided, so although the Examiner is required to accept that the mark is in current use, the nature of that use is unknown." The Complainant's mark is "HELLO!" (with an exclamation point). While the difference is one character, the word "hello" is otherwise one of the most spoken words in the English language. When common words are at issue "small differences matter" as discussed at length in *Tire Discounters, Inc. v. TireDiscounter.com*, NAF Claim No. 679485, the complainant's mark TIRE DISCOUNTERS differed by only one letter from the disputed domain name <tirediscounter.com>. Because the complainant's mark was descriptive, the mark was deemed to be not confusingly similar to the domain. As stated in *Webvan Group, Inc. v. Stan Atwood*, WIPO Case No. D2000-1512, "[W]hen the mark is a relatively weak, non-distinctive term, courts have found that the scope of protection may be limited to the identical term and that the addition of other descriptive matter may avoid confusion". While the difference here between "HELLO!" and "HELLO" is small, the burden under the URS is to establish by clear and convincing evidence that an everyday word, literally, is confusingly similar to the Complainant's punctuated mark, contrary to findings on point of the lower-standard UDRP. This is not a case where the underlying punctuated mark is famous or immediately distinctive, as it might be for say "AT&T" and "ATT". While the full mark "HELLO!" may distinguish Complainant's magazine from others on a magazine rack, it does not render the mere word itself to be confusingly similar. Indeed, it is likely said by any customer entering a news stand, who is then not handed the Complainant's magazine, but simply greeted in return by the clerk.

[URS 1.2.6.2] Registrant has no legitimate right or interest to the domain name

Response: The word "HELLO" is a common word, not exclusive to the Complainant. The Complainant's screenshot of the site shows that it was taken at a moment when an error was generated "Failed to Load Page Content". However, even there, one can see a banner graphic with images suggestive of photography. All text is in English, unlike Complainant's market, and there is nothing which infringes or implicates Complainant's claimed rights in "Video tapes, Magazines and periodical publications, Services provided by publishing houses". Beyond that recitation, we do not know what business the Complainant conducts under the asserted mark. The Complainant's screenshot - bearing an error message - is unrepresentative of how the lander page operates. A copy of the site, taken at a time when the system was operating properly is attached as Exhibit A. Respondent is not using these non-exclusive terms in association with the Complainant's products or services, which are unknown beyond the bare recitation in the trademark registration. Such non-infringing use of non-exclusive terms is fair use under URS 5.8.1, and as further discussed below. The Respondent, North Sound Names, has registered a collection of "premium names" as they are known on the secondary market, which have independent value apart from any trademark claim. These include a large number of common everyday words which may have utility for photography. Generic words have inherent value, and the names are used to suggest such utility to prospective purchasers. North Sound Names has registered these premium names primarily for sale on the secondary market to persons seeking to use them for their generic value or descriptive purposes. Here, "hello.photo" may be useful for a variety of photographic services, photo greeting card services, etc.. Empirically, users are prone to type in common word domain names just to see what is there. For example, a person musing on naming a photo greeting card service may type "hello.photo" to see if it is available or to see what is there. For that reason, the "lander" associated with the domain name includes categorical suggestions to such a visitor, which resonate with their reason for typing it in, and suggest uses to which such a visitor may put the domain name, to motivate them to inquire about purchase. Exhibit B shows, for the names GREETING.PHOTO and WELCOME.PHOTO, also having a similar meaning to "HELLO", the same lander page, having the same categories relating to photography and photographers. These subjects tie the concept expressed by the name to the relevant utility of the domain name itself and suggests uses to which the domain name may be productively put by a commercial photographer, such as a photo greeting card service, while also providing a top link to inquire about obtaining the domain name, and a bottom banner affiliate registrar link in the event a visitor curious about .photo names can seek others. The search suggestions at the page appeal to what motivated the visitor to type in the name, and to suggest they should obtain it for such purposes. As can be appreciated, the Complainant was by no means singled out amidst what is otherwise a considerable list of common words. As such, Respondent submits the Complainant has failed to show by clear and convincing evidence that the Respondent's use of the domain name has anything to do with the goods or services of the Complainant. While the Complainant's magazine may include photographs, the Complainant does not have rights in "HELLO!" for photographic services. The Complainant nowhere suggests that Respondent is using the names to infringe Complainant's marks.

[URS 1.2.6.3] The domain name(s) was/were registered and is being used in bad faith.

- a. Registrant has registered or acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of documented out-of pocket costs directly related to the domain name; or
- b. Registrant has registered the domain name in order to prevent the trademark holder or service mark from reflecting the mark in a corresponding domain name, provided that Registrant has engaged in a pattern of such conduct; or
- c. Registrant registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- d. By using the domain name Registrant has intentionally attempted to attract for commercial gain, Internet users to Registrant's web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of Registrant's web site or location or of a product or service on that web site or location.

Response: The Complainant does not demonstrate by clear and convincing evidence, or with any particularity, any manner in which the Respondent's registration and use of the domain name is aimed at exploiting the Complainant's mark, or is diversionary of persons seeking the Complainant. The word "hello" is not exclusive to the Complainant, and not generally understood to refer to the Complainant. The Complainant does not own or operate hello.com, in the most popular TLD, and does not operate hello.net, hello.org, or even hello.es - in the Complainant's own country-code TLD.

There is no reason to believe persons accessing hello.photo are seeking and being diverted from the Complainant, given that "hello" in these long-established TLD's, even the Complainant's home country, does not lead to the Complainant either. There is no question that parties - including the Respondent - are entitled to use the word "hello" for many purposes. In fact, the Respondent maintains records of Trademark Clearinghouse Claims Notices for reference, to avoid selling a domain name to parties in the indicated fields. In this instance, there are actually two TMCH records relating to the string <hello> (Exhibit C), neither of which mark is implicated by Respondent's use of the domain name. The TMCH Claims Notice is not intended to bar registration of a domain name. It is intended to provide notice of uses of a domain name in which others may claim rights. Otherwise, there would be no call for the URS itself, since it could be taken as automatic that registration of a TMCH-listed domain name and non-infringing use of it somehow constituted a bad faith predatory intent. If it were, the ICANN TMCH scheme would have simply forbidden registration, instead of merely requiring a notice. But the TMCH notice is simply that - a notice of what things a domain name cannot be used for. The points discussed in the section above also apply to express requirements of the URS, which essentially codify, as affirmative defenses, key qualitative aspects of domain speculation and monetization against allegations of bad faith registration and use. The first of these is URS 5.9.1 "5.9.1 Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves not indicia of bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute." Non-infringing use and resale of non-exclusive, common words, is expressly addressed in the URS, unlike the UDRP, and requires an analysis of the "circumstances of the dispute". The circumstances here are that the domain name corresponds to a common word, and its use does not implicate, refer to, or compete with, the Complainant. Respondent has registered a large portfolio of common words in .photo for resale. The motivation for registering this domain name arises from its primary significance as a word used in greeting, and the popularity of commercial photographic services engaged in personalized greeting cards as but one obvious utility of the name. The second express URS consideration constituting a relevant affirmative defense here is: "5.9.2 Sale of traffic (i.e. connecting domain names to parking pages and earning click- per-view revenue) does not in and of itself constitute bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner will take into account: 5.9.2.1. the nature of the domain name; 5.9.2.2. the nature of the advertising links on any parking page associated with the domain name; and 5.9.2.3. that the use of the domain name is ultimately the Registrant's responsibility." The nature of the domain names is that it is one of the most commonly spoken words in English, and it may be of interest to, for example, a photography service seeking to use it, or someone simply wanting to say "hello" in photos. The nature of the advertising links relates to suggested uses in connection with photography, designed to appeal to those legitimate uses. The links do not suggest any products or services provided by Complainant, about which the Complaint is unclear, and thus neither clear nor convincing. Had the Respondent intended to somehow piggyback on whatever may be the Complainant's rights, the Respondent would be advertising magazines, and would be doing so in Spanish. While it is true that magazines have photographs in them, a magazine does not provide or compete with photographic services themselves. Likewise the vague "services provided by a publishing house" presumably are publishing services, and not photographic services. The "clear and convincing" standard of the URS does not admit guesses as to what these "publishing services" might be. The Respondent is manifestly not targeting the Complainant in its interim use of the domain name or intent to sell it to a party seeking to use the word "hello" for reasons as vast as those illustrated by use of "hello" in .com, .net, .org, .es, or any other TLD. URS 5.8.1 and 5.9.1-2 are a purposeful distinction between the URS and the UDRP, to avoid these kinds of pro forma allegations amounting to "because the domain name corresponds to the mark, it was therefore necessarily registered in bad faith". These clear delineations between the URS and the UDRP fairly define the circumstances present here - where a domain name has obvious commercial value as a generic word independent of a trademark claim, and is not shown to be used in violation of the mark by clear and convincing evidence. The mere fact that the Respondent registered a common word as a domain name to promote its use to persons interested in photography, photographic services or even personal use to persons who may desire it, falls far short of discharging Complainant's burden of showing "clear and convincing" bad faith directed at Complainant. The Complainant alleges no act by the Respondent taken in deprecation of the Complainant's limited trademark claim. The Complainant's mere recitation of the Policy criterion here, without reference to any fact cannot be "clear and convincing" of anything. While the word limit is severe, it behooves the Complainant to at least provide a few words alleging some act of the Respondent constituting bad faith, other than registration of a common word as a domain name and seeking resale of a generic word domain name. The URS specifically provides that trading in domain names and traffic for profit is a permissible activity, and the Complainant has not shown how that activity here constitutes a bad faith intent directed toward the Complainant, as opposed to a generalized intent to exploit the generic word "hello".

Certifications

1. The contents of the Response are true and accurate.
2. Respondent agrees that its claims and remedies concerning the dispute, or the dispute's resolution, shall be solely against the Complainant and waives all such claims and remedies against (a) the Provider and Examiner, except in the case of deliberate wrongdoing, (b) the Registrar, (c) the Registry Operator, and (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.
3. Respondent certifies that the information contained in this Response is, to the best of Respondent's knowledge, complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under these Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.
4. There are no other legal proceedings that have been commenced or terminated in connection with or relating to any of the domain name(s) that are the subject of the Complaint.


August 4, 2014

/s/ John Berryhill

EXHIBIT A

WEBSITE DURING NORMAL PAGE LOAD

Hello.photo



Related Links

- » [Advertising Agency](#)
- » [Advertising Firms](#)
- » [Commercial Photographers](#)
- » [Commercial Photography](#)
- » [Corporate Photography](#)
- » [Digital Photographers](#)
- » [Digital Photography](#)
- » [Industrial Photographers](#)
- » [Light Meters](#)
- » [Los Angeles Photographers](#)

[Privacy Policy](#)



Uniregistry

Want to buy a domain name?



[Search Here](#)

EXHIBIT B

GREETING.PHOTO AND WELCOME.PHOTO

Greeting.photo is part of a new generation of domain names. [Click here](#) to make it yours!



Greeting.photo

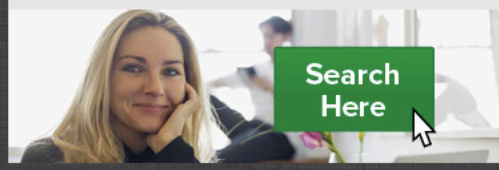
Related Links

- » [Advertising Agency](#)
- » [Advertising Firms](#)
- » [Commercial Photographers](#)
- » [Commercial Photography](#)
- » [Corporate Photography](#)
- » [Digital Photographers](#)
- » [Digital Photography](#)
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- » [Los Angeles Photographers](#)

[Privacy Policy](#)



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Welcome.photo

Related Links

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- » [Advertising Firms](#)
- » [Commercial Photographers](#)
- » [Commercial Photography](#)
- » [Corporate Photography](#)
- » [Digital Photographers](#)
- » [Digital Photography](#)
- » [Industrial Photographers](#)
- » [Light Meters](#)
- » [Los Angeles Photographers](#)

[Privacy Policy](#)

Uniregistry

Want to buy a domain name?

[Search Here](#)

EXHIBIT C

TRADEMARK CLEARINGHOUSE NOTICES

[Hello.photo](#) | [Inquiries](#) | **Domains** | [Settings](#) | [Reports](#) | [More](#) | [Admin](#) |

Hello.photo
Hello, John Berryhill [NAMedia] - [Log Out](#)

[Specific Keyword](#) | [Trademark Claims 2 Notices](#) | [Legal Notes](#)

Portfolio: no

Category: art

Sub-Category: pho

Price Range: un

Specific Keyword: Ye

Keywords: He

Purchased Date: n/a

Purchased Price: n/a

Registrar: n/a

Registered: 00

Rank Info

Revenue Rank: n/a

Traffic Rank: n/a

Total Names: 36

Avg Monthly Revenue: \$0.

Avg Daily Traffic: 0.0

Rev. per Unique: \$0.

Total Inquiries: 0

View Domain Trademark Claims x

Trademark claims on hello.photo

Claim 1

Name	HELLO
Jurisdiction	Benelux Office for Intellectual Property (BOIP)
Goods	CI 36 Assurances; affaires financières; affaires monétaires; affaires immobilières; affaires bancaires; services de financement, agences de recouvrement de créances, crédit, courtage en biens immobiliers, évaluation de biens immobiliers, consultation en matière immobilière, gérance de biens immobiliers, gérance d'immeubles, location d'appartements, location de bureaux (immobilier), consultation en matière d'assurances, courtage en assurances, cautions (garanties), épargne, placement de fonds, actuariat, affacturage, cote en bourse, courtage en bourse, caisses de prévoyance, services de cartes de crédit, services de cartes de débit, opérations de change, vérification des chèques, émission de chèques bancaires, dépôt en coffres-forts, émission de bons de valeur, émission de cartes de fidélité (service financier), estimations fiscales, services fiduciaires, transfert électronique de fonds, gérance de fortunes, parrainage financier, transactions financières, banque directe (home- banking); services d'informations, de conseils et d'assistance bancaires, financiers, monétaires ou immobiliers; services bancaires, financiers, monétaires, immobiliers ou d'assurances en ligne sur des réseaux de télécommunication (y compris téléphones mobiles), des réseaux télématiques et des réseaux de communications informatiques.

[Hello.photo](#) | [Inquiries](#) | [Domains](#) | [Settings](#) | [Reports](#) | [More](#) | [Admin](#) |

Hello.photo

[Specific Keyword](#) | [Trademark Claims \(2 Notices\)](#) | [Legal Notes](#)

Portfolio: no
Category: art
Sub-Category: ph
Price Range: un
Specific Keyword: Ye
Keywords: He
Purchased Date: n/a
Purchased Price: n/a
Registrar: n/a
Registered: 00

Rank Info
Revenue Rank: n/a
Traffic Rank: n/a
Total Names: 36
Avg Monthly Revenue: \$0.
Avg Daily Traffic: 0.0
Rev. per Unique: \$0.
Total Inquiries: 0

View Domain Trademark Claims

Trademark claims on hello.photo

telecommunication (y compris telephones mobiles), des reseaux telematiques et des reseaux de communications informatiques.

International Classes 36 - Insurance; financial affairs; monetary affairs; real estate affairs.

Trademark Registrant	
Holder	Contact
BNP PARIBAS	Jean-Paul BECHU NAMESHIELD
16 Boulevard des Italiens	27 rue des Arènes
PARIS, 75009, FR	ANGERS, 49100, FR
	Email: tmch@nameshield.net
	Voice: +33.241182828
	Fax: +33.241182829

Claim 2

Name	HELLO!
Jurisdiction	Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM)
Goods	Video tapes, Magazines and periodical publications, Services provided by publishing houses
International Classes	41 - Education; providing of training; entertainment; sporting and cultural activities.
Trademark Registrant	

EXHIBIT D

FORMATTED TEXT OF RESPONSE FORM ENTRIES

1.

Due to formatting issues encountered with the NAF text-entry system, the full text of this Response is also attached in .pdf format as Exhibit D hereto.

Complainant does not show the mark is in current use. The Trademark Clearinghouse (TMCH) standard of "specimen of use" is unknown, and the specimen is not accessible. When the URS was formulated, it was assumed that the TMCH specimen would be accessible via the TMCH record. While indeed the URS permits TMCH record to be used as evidence of use, the TMCH record itself does not show what the specimen may have been or indeed how the Complainant claims to use the mark for the recited services. As noted in URS proceeding NAF FA1405001558494 <finn.sexy> "Complainant has provided a copy of a Trademark Clearinghouse document stating that proof of use is 'valid' and that an attached Declaration and a single sample have been uploaded. The attachments themselves have not been provided, so although the Examiner is required to accept that the mark is in current use, the nature of that use is unknown."

The Complainant's mark is "HELLO!" (with an exclamation point). While the difference is one character, the word "hello" is otherwise one of the most spoken words in the English language. When common words are at issue "small differences matter" as discussed at length in *Tire Discounters, Inc. v. TireDiscounter.com*, NAF Claim No. 679485, the complainant's mark TIRE DISCOUNTERS differed by only one letter from the disputed domain name <tirediscounter.com>. Because the complainant's mark was descriptive, the mark was deemed to be not confusingly similar to the domain. As stated in *_Webvan Group, Inc. v. Stan Atwood_*, WIPO Case No. D2000-1512, "[W]hen the mark is a relatively weak, non-distinctive term, courts have found that the scope of protection may be limited to the identical term and that the addition of other descriptive matter may avoid confusion".

While the difference here between "HELLO!" and "HELLO" is small, the burden under the URS is to establish by clear and convincing evidence that an everyday word, literally, is confusingly similar to the Complainant's punctuated mark, contrary to findings on point of the lower-standard UDRP. This is not a case where the underlying punctuated mark is famous or immediately distinctive, as it might be for say "AT&T" and "ATT". While the full mark "HELLO!" may distinguish Complainant's magazine from others on a magazine rack, it does not render the mere word itself to be confusingly similar. Indeed, it is likely said by any customer entering a news stand, who is then not handed the Complainant's magazine, but simply greeted in return by the clerk.

2.

The word "HELLO" is a common word, not exclusive to the Complainant. The Complainant's screenshot of the site shows that it was taken at a moment when an error was generated "Failed to Load Page Content". However, even there, one can see a banner graphic with images suggestive of photography. All text is in English, unlike Complainant's market, and there is nothing which infringes or implicates Complainant's claimed rights in "Video tapes, Magazines and periodical publications, Services provided by publishing houses". Beyond that recitation, we do not know what business the Complainant conducts under the asserted mark.

The Complainant's screenshot - bearing an error message - is unrepresentative of how the lander page operates. A copy of the site, taken at a time when the system was operating properly is attached as Exhibit A.

Respondent is not using these non-exclusive terms in association with the Complainant's products or

services, which are unknown beyond the bare recitation in the trademark registration. Such non-infringing use of non-exclusive terms is fair use under URS 5.8.1, and as further discussed below.

The Respondent, North Sound Names, has registered a collection of "premium names" as they are known on the secondary market, which have independent value apart from any trademark claim. These include a large number of common everyday words which may have utility for photography. Generic words have inherent value, and the names are used to suggest such utility to prospective purchasers.

North Sound Names has registered these premium names primarily for sale on the secondary market to persons seeking to use them for their generic value or descriptive purposes. Here, "hello.photo" may be useful for a variety of photographic services, photo greeting card services, etc.. Empirically, users are prone to type in common word domain names just to see what is there. For example, a person musing on naming a photo greeting card service may type "hello.photo" to see if it is available or to see what is there. For that reason, the "lander" associated with the domain name includes categorical suggestions to such a visitor, which resonate with their reason for typing it in, and suggest uses to which such a visitor may put the domain name, to motivate them to inquire about purchase.

Exhibit B shows, for the names GREETING.PHOTO and WELCOME.PHOTO, also having a similar meaning to "HELLO", the same lander page, having the same categories relating to photography and photographers.

These subjects tie the concept expressed by the name to the relevant utility of the domain name itself and suggests uses to which the domain name may be productively put by a commercial photographer, such as a photo greeting card service, while also providing a top link to inquire about obtaining the domain name, and a bottom banner affiliate registrar link in the event a visitor curious about .photo names can seek others. The search suggestions at the page appeal to what motivated the visitor to type in the name, and to suggest they should obtain it for such purposes. As can be appreciated, the Complainant was by no means singled out amidst what is otherwise a considerable list of common words.

As such, Respondent submits the Complainant has failed to show by clear and convincing evidence that the Respondent's use of the domain name has anything to do with the goods or services of the Complainant. While the Complainant's magazine may include photographs, the Complainant does not have rights in "HELLO!" for photographic services. The Complainant nowhere suggests that Respondent is using the names to infringe Complainant's marks.

3.

The Complainant does not demonstrate by clear and convincing evidence, or with any particularity, any manner in which the Respondent's registration and use of the domain name is aimed at exploiting the Complainant's mark, or is diversionary of persons seeking the Complainant.

The word "hello" is not exclusive to the Complainant, and not generally understood to refer to the Complainant. The Complainant does not own or operate hello.com, in the most popular TLD, and does not operate hello.net, hello.org, or even hello.es - in the Complainant's own country-code TLD. There is no reason to believe persons accessing hello.photo are seeking and being diverted from the Complainant, given that "hello" in these long-established TLD's, even the Complainant's home country, does not lead to the Complainant either.

There is no question that parties - including the Respondent - are entitled to use the word "hello" for many purposes. In fact, the Respondent maintains records of Trademark Clearinghouse Claims Notices

for reference, to avoid selling a domain name to parties in the indicated fields. In this instance, there are actually two TMCH records relating to the string <hello> (Exhibit C), neither of which mark is implicated by Respondent's use of the domain name. The TMCH Claims Notice is not intended to bar registration of a domain name. It is intended to provide notice of uses of a domain name in which others may claim rights. Otherwise, there would be no call for the URS itself, since it could be taken as automatic that registration of a TMCH-listed domain name and non-infringing use of it somehow constituted a bad faith predatory intent. If it were, the ICANN TMCH scheme would have simply forbidden registration, instead of merely requiring a notice. But the TMCH notice is simply that - a notice of what things a domain name cannot be used for.

The points discussed in the section above also apply to express requirements of the URS, which essentially codify, as affirmative defenses, key qualitative aspects of domain speculation and monetization against allegations of bad faith registration and use. The first of these is URS 5.9.1

"5.9.1 Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves not indicia of bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute."

Non-infringing use and resale of non-exclusive, common words, is expressly addressed in the URS, unlike the UDRP, and requires an analysis of the "circumstances of the dispute". The circumstances here are that the domain name corresponds to a common word, and its use does not implicate, refer to, or compete with, the Complainant. Respondent has registered a large portfolio of common words in .photo for resale. The motivation for registering this domain name arises from its primary significance as a word used in greeting, and the popularity of commercial photographic services engaged in personalized greeting cards as but one obvious utility of the name.

The second express URS consideration constituting a relevant affirmative defense here is:

"5.9.2 Sale of traffic (i.e. connecting domain names to parking pages and earning click- per-view revenue) does not in and of itself constitute bad faith under the URS. Such conduct, however, may be abusive in a given case depending on the circumstances of the dispute. The Examiner will take into account:

5.9.2.1. the nature of the domain name;

5.9.2.2. the nature of the advertising links on any parking page associated with the domain name; and

5.9.2.3. that the use of the domain name is ultimately the Registrant's responsibility."

The nature of the domain names is that it is one of the most commonly spoken words in English, and it may be of interest to, for example, a photography service seeking to use it, or someone simply wanting to say "hello" in photos. The nature of the advertising links relates to suggested uses in connection with photography, designed to appeal to those legitimate uses. The links do not suggest any products or services provided by Complainant, about which the Complaint is unclear, and thus neither clear nor convincing.

Had the Respondent intended to somehow piggyback on whatever may be the Complainant's rights, the Respondent would be advertising magazines, and would be doing so in Spanish. While it is true that magazines have photographs in them, a magazine does not provide or compete with photographic services themselves. Likewise the vague "services provided by a publishing house" presumably are publishing services, and not photographic services. The "clear and convincing" standard of the URS does not admit guesses as to what these "publishing services" might be. The Respondent is manifestly not targeting the Complainant in its interim use of the domain name or intent to sell it to a party seeking to use the word "hello" for reasons as vast as those illustrated by use of "hello" in .com, .net, .org, .es,

or any other TLD.

URS 5.8.1 and 5.9.1-2 are a purposeful distinction between the URS and the UDRP, to avoid these kinds of pro forma allegations amounting to "because the domain name corresponds to the mark, it was therefore necessarily registered in bad faith". These clear delineations between the URS and the UDRP fairly define the circumstances present here - where a domain name has obvious commercial value as a generic word independent of a trademark claim, and is not shown to be used in violation of the mark by clear and convincing evidence.

The mere fact that the Respondent registered a common word as a domain name to promote its use to persons interested in photography, photographic services or even personal use to persons who may desire it, falls far short of discharging Complainant's burden of showing "clear and convincing" bad faith directed at Complainant. The Complainant alleges no act by the Respondent taken in deprecation of the Complainant's limited trademark claim.

The Complainant's mere recitation of the Policy criterion here, without reference to any fact cannot be "clear and convincing" of anything. While the word limit is severe, it behooves the Complainant to at least provide a few words alleging some act of the Respondent constituting bad faith, other than registration of a common word as a domain name and seeking resale of a generic word domain name. The URS specifically provides that trading in domain names and traffic for profit is a permissible activity, and the Complainant has not shown how that activity here constitutes a bad faith intent directed toward the Complainant, as opposed to a generalized intent to exploit the generic word "hello".

[Word Count 2129]