UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FUTURE MEDIA ARCHITECTS, INC., Plaintiff, v. DEUTSCHE LUFTHANSA AG, Defendant.	**Case No.: 08-cv-02801(LAK)** **JURY TRIAL REQUESTED**

FIRST AMENDED COMPLAINT

Plaintiff Future Media Architects, Inc. (hereinafter referred to as "FMA" or "Plaintiff"), by its attorneys, Kenyon & Kenyon LLP, as and for its First Amended Complaint against defendant Deutsche Lufthansa AG (hereinafter referred to as "Lufthansa" or "Defendant"), alleges as follows, upon knowledge with respect to itself and its own acts, and upon information and belief as to all other matters:

Nature of Action and Subject Matter Jurisdiction

1. This is a declaratory judgment action arising under the trademark laws of the United States and the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1051 *et seq.* By this action, FMA seeks review of its rights to a domain name under 15 U.S.C. § 1114(2)(d)(v) and a declaratory judgment that: (1) its ownership of the domain name <www.lh.com> does not violate any alleged rights owned by Defendant; and (2) any trademark rights in and to the phrase "lh" allegedly owned by Defendant are invalid, void and/or otherwise unenforceable. FMA also seeks a judgment against Defendant for

tortious interference with prospective business relations; fraud and cancellation of U.S. Trademark Registration No. 1,871,600.

2. Subject matter jurisdiction over this action is conferred upon this Court: (i) pursuant to 28 U.S.C. §§ 2201 and 2202, because it involves a request for declaratory judgment in a case of actual controversy; and (ii) pursuant to 28 U.S.C. §§ 1331 and 1338, and 15 U.S.C. §§ 1114 and 1125, because, *inter alia*, the suit concerns rights under the Lanham Act.

Personal Jurisdiction and Venue

This Court has personal jurisdiction over Defendant, and venue is properly laid in the Southern District of New York, pursuant to 28 U.S.C. § 1391, in that, on information and belief, Defendant is doing and transacting business within this District; has substantial contacts with and/or may be found in this District; and/or a substantial portion of the events at issue have arisen and continue to occur in this Judicial District, among others.

The Parties

3. Plaintiff FMA is an Internet development company with a business address at P.O. Box 71, Road Town, Tortola, British Virgin Islands.

4. On information and belief, Defendant Lufthansa is a German Corporation with addresses at Von-Gablenz-Strasse 2-6, 50679 Koln, Germany and 1640 Hempstead Turnpike, East Meadow, NY 11554.

Background of the Controversy

5. FMA is a leading Internet development company. It develops its own Internet properties, Internet portals and technology.

6. FMA's own development projects include, for example:

MP3.tv, a music community portal that was launched by FMA in January 2002. This website enjoys hits from well over 30,000 unique visitors a day from more than 120 countries.

DJ.net, a portal for DJs who require a web presence and want to network with other professionals in their industry. This site was launched by FMA in February 2003 and is also available as a search engine to locate a DJ.

OXiDE.com, FMA's own search engine.

7. FMA does not do development for third parties.

8. As part of its business, FMA is the owner of approximately 100,000 domain names.

9. FMA does not sell its domain names, and does not purchase domain names with the intention of selling them.

10. In fact, anyone contacting FMA regarding the purchase of a domain name is automatically sent the following email:

Dear Sir/ Madam,

To individuals and entities interested in purchasing a domain name from FMA, we regret to advise you that pursuant to the Company's Policy and Strategic Planning, all domain names owned by Future Media Architects, Inc. are not for sale at this time. We do not anticipate this policy changing in the near future.

11. One of the domain names owned by FMA is <www.lh.com> (the "Domain Name").

12. FMA has received numerous offers to purchase the Domain Name, including at least one offer of one million dollars or more.

13. Despite the significant amount of money offered for the Domain Name, FMA has not sold the domain name.

14. One such entity that has offered to purchase the domain name, although for an undetermined price, is Defendant.

15. Defendant first contact FMA regarding the Domain Name approximately two years ago.

16. As per its policy, FMA did not enter negotiations to sell the Domain Name.

17. Since first contacting FMA, Defendant has periodically contacted FMA or its attorneys at Kenyon & Kenyon seeking to negotiate the sale or transfer of the Domain Name to Defendant.

18. FMA has steadfastly refused to sell the Domain Name to Defendant, or any other party.

19. On or about February 25, 2008 Defendant filed a U.D.R.P. Complaint against FMA seeking a forced transfer of the Domain Name to Defendant (Case Number FA0802001153492). The U.D.R.P. three-member Panel ordered the transfer of the Domain Name to Defendant on April 22, 2008, with a dissenting opinion that did not agree with the order to transfer the Domain Name.

20. In support of its U.D.R.P. Complaint, Defendant alleges, *inter alia*, that:

(1) it owns the "internationally known and famous trademark and service mark LH";

(2) FMA's use of the Domain Name creates a likelihood of confusion with Defendant's alleged LH mark;

(3) FMA has no right to the Domain Name; and

(4) FMA registered the Domain Name in bad faith.

21. FMA's ownership of the Domain Name does not infringe any rights that Defendant may allegedly own.

22. FMA has never had a bad faith intent to profit from the Domain Name or exercised bad faith in any manner.

23. FMA did not register or acquire the Domain Name in bad faith.

24. FMA has a right to own and use the Domain Name as it did not register or acquire it in bad faith.

25. Defendant's alleged LH mark is not distinctive now, and was not distinctive when FMA acquired the Domain Name.

26. Luftansa's alleged LH mark is not famous now, and was not famous when FMA acquired the Domain Name.

27. Defendant does not have any protectable rights to its alleged LH mark in the United States.

28. FMA's ownership of the Domain Name is not likely to cause confusion with any rights allegedly owned by Defendant.

29. FMA has always believed, and continues to believe that the use of the domain name was a fair use or otherwise lawful, as the term "lh" is not distinctive of any one source or entity.

30. Thus, an actual and justiciable controversy concerning FMA's ownership of the Domain Name exists between FMA and Defendant.

31. In light of the facts averred above, FMA has a reasonable apprehension that Defendant will initiate a trademark infringement and/or cybersquatting suit against it, claiming that FMA is infringing Defendant's alleged rights by its ownership of the Domain Name.

32. Furthermore, FMA is entitled to United States Federal Court review of its rights to the Domain Name under 15 U.S.C. § 1114(2)(d)(v); as the Domain Name has

been suspended, placed outside of the control of FMA and ordered transferred as a result of the U.D.R.P. proceeding.

33. In its U.D.R.P. Complaint, Defendant states that its "company Lufthansa was founded in 1926 in Berlin, Germany, and that its right to the alleged LH mark dates back to 1929." (*See* Exhibit A, U.D.R.P. Complaint, ¶ 13.) However, a review of Defendant's own evidence in support of its U.D.R.P. Complaint revealed that:

> . . . Lufthansa was always the favorite air carrier of Adolf Hitler and, later, was the official airline of the Nazi party. . . . [A]ll service was suspended by Lufthansa following Germany's defeat in 1945.
>
> Lufthansa was recreated on 6 January 1953 as Aktiengesellschaft für Luftverkehrsbedarf and was renamed Deutsche Lufthansa Aktiengesellschaft on August 6, 1954. **The "new" Lufthansa of 1953 is not the legal successor of the Lufthansa founded in 1926 and which existed during and before World War II.**

(*See* Exhibit A, U.D.R.P. Complaint, Exhibit E thereto, emphasis added).

34. Defendant's own website confirms that the statements made in Defendant's U.D.R.P. Complaint were false, stating that:

> All flights are discontinued in 1945 and Lufthansa goes into receivership and is finally wound up and struck from the Berlin commercial register in 1965.
>
> The Federal Transport Minister sets up a working committee in 1951 to prepare for the resumption of air traffic in postwar Germany. . . . **A new company to run air services and named "Aktiengesellschaft für Luftverkehrsbedarf" (Luftag) is founded in Cologne on January 6, 1953.** The company changes its name to the more traditional "Deutsche Lufthansa Aktiengesellschaft" in 1954, and resumes scheduled flights on April 1, 1955.

Lufthansa – Chronicle, http://konzern.lufthansa.com/en/html/ueber_uns/geschichte/chronik/index.html (emphasis added).

35. When it submitted its U.D.R.P. Complaint on or about February 25, 2008, Defendant certified that the information contained in its Complaint "is to the best of Complainant's knowledge complete and accurate."

36. As explained herein, the information contained in Defendant's Complaint was not accurate. Therefore, when Defendant submitted its Complaint stating, *inter alia*, its "company Lufthansa was founded in 1926 in Berlin, Germany, and that its right to the alleged LH mark dates back to 1929," such information was false. Additionally, Defendant's statement that the information contained in its Complaint "is to the best of Complainant's knowledge complete and accurate" was also false.

37. Defendant misrepresented the scope, history and validity of its alleged trademark rights intentionally, and knowingly and willfully made false statements in its U.D.R.P. Complaint. Defendant's false statements were made with the intent to induce the Panel deciding the U.D.R.P. proceeding to transfer the Domain Name to Defendant.

38. The U.D.R.P. Panel reasonably relied upon the truth of Defendant's false statements, and the U.D.R.P. Panel, did, in fact, order the transfer of the Domain Name.

39. Defendant's false statements were material to the U.D.R.P. proceeding and resulting transfer order.

40. Defendant knew, or should have known, that the statements were false at the time it filed its U.D.R.P. Complaint.

41. FMA has been damaged by Defendant's false statements because, at a minimum, the U.D.R.P. Panel has ordered the transfer of the Domain Name based upon Defendant's false statements.

42. Further, Defendant's allegations and U.D.R.P. proceedings are an attempt to strong-arm FMA and interfere with FMA's prospective business relations.

43. Unwilling to accept that FMA was the rightful owner to the lh.com Domain Name and that FMA did not want to sell them the Domain Name, Defendant initiated a U.D.R.P. proceeding against FMA that amounts to reverse domain name hijacking.

44. As a result of Defendant's conduct outlined herein, Defendant has caused injury to FMA's reputation as a legitimate business and domain name registrant and has harmed its relationship with its customers.

45. Moreover, the inconsistencies and outright falsehoods contained in Defendant's U.D.R.P. complaint evidence a larger pattern of Defendant's misconduct in falsely and fraudulently claiming trademark rights it does not own.

46. For example, Defendant's application bearing serial number 74/383,263 for the LUFTHANSA mark was filed on April 27, 1993, and recites as its goods and services "air, land and marine passengers and freight transportation services; travel agency services including making air, sea and land reservations; arranging travel tours and cruises for others; vehicle rental services; services of chartering aircraft or ships; cargo handling services, warehouse storage services and freight forwarding services."

47. Defendant states in its trademark application, filed on or about April 27, 1993, that "the [LUFTHANSA] mark was first used at least as early as 1929; was first used in commerce which the United States Congress may regulate between the United States and Germany at least as early as 1929."

48. This statement was material to the prosecution of the application, and was relied upon by the USPTO in granting the registration for the LUFTHANSA mark.

49. Defendant's first use of the LUFTHANSA mark could not have been any earlier than the date of its own corporate inception in 1953. As such, Defendant's alleged

first use date is fraudulently stated as a quarter century earlier than its actual first use date.

50. Defendant knew, or should have known, that it had not used the LUFTHANSA mark in 1929, because, for example, its own website states that it did not exist yet.

51. Defendant intentionally made such false statements to induce the USPTO to grant the registration, and the USPTO reasonably relied upon the truth of the false statements and grated U.S. Trademark Registration for LUFTHANSA (Reg. No. 1,871,600).

52. FMA is likely to be damaged by U.S. Trademark Registration for LUFTHANSA (Reg. No. 1,871,600).

53. In light of the above, it is clear that Defendant committed fraud on the USPTO by claiming a false or fraudulent first use date of the LUFTHANSA mark.

54. When a trademark applicant commits fraud in the procurement of a mark by making material misrepresentations that it knows or should know to be false, its registration is subject to cancellation. *Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q.2d 1205 (T.T.A.B. 2003).

55. Pursuant to the *Medinol* line of cases and 15 U.S.C. § 1119, Defendant's LUFTHANSA registration (U.S. Trademark Reg. No. 1,871,600) should be canceled.

COUNT I

DECLARATION THAT FMA'S OWNERSHIP OF THE DOMAIN NAME DOES NOT VIOLATE ANY OF DEFENDANT'S ALLEGED RIGHTS

56. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 55 of this Complaint as though fully set forth herein.

57. By reason of the existence of an actual and justiciable controversy as discussed herein, FMA is entitled to a declaratory judgment that its ownership of the Domain Name does not violate any rights owned by Defendant. Accordingly, FMA seeks a declaration of the Court that its ownership of the Domain Name does not violate any rights owned by Defendant.

COUNT II

DECLARATION THAT DEFENDANT'S ALLEGED LH MARK IS INVALID, VOID AND/OR OTHERWISE UNENFORCEABLE

58. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 57 of this Complaint as though fully set forth herein.

59. By reason of the existence of an actual and justiciable controversy as discussed herein, FMA is entitled to a declaratory judgment that any trademark rights in and to the phrase "lh" allegedly owned by Defendant are invalid, void and/or otherwise unenforceable. Accordingly, FMA seeks a declaration of the Court that any trademark rights in and to the phrase "lh" allegedly owned by Defendant are invalid, void and/or otherwise unenforceable.

COUNT III

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

60. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 59 of this Complaint as though fully set forth herein.

61. At all relevant times, Defendant was aware of the business relations between FMA and its customers and potential customers.

62. Despite such knowledge, Defendant purposely, wrongfully and/or unlawfully interfered with FMA's business relations, by, for example, intentionally making false statements to induce the wrongful transfer of the Domain Name.

63. Defendant acted for the sole purpose of inflicting intentional harm on FMA.

64. By launching against FMA an aggressive and frivolous U.D.R.P. proceeding that constitutes reverse domain name hijacking, Defendant has harmed FMA's reputation as a legitimate business and domain name registrant. As a direct and proximate cause of Defendant's tortious conduct, FMA has suffered, and will continue to suffer, monetary damage, loss and injury, in an amount to be determined at trial.

COUNT IV

FRAUD

65. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 64 of this Complaint as though fully set forth herein.

66. Defendant, though its conduct described herein, has made material misrepresentations of fact in the furtherance of its U.D.R.P. complaint.

67. Defendant knew, or should have known, that such statement were false.

68. Defendant intentionally made such statements so that the Panel deciding the U.D.R.P. action would rely on such false statements.

69. The U.D.R.P. panel did rely on such statements, such reliance being reasonable.

70. As a result of Defendant's fraud, FMA has been damaged in an amount to be determined at trial.

COUNT V

CANCELLATION OF DEFENDANT'S LUFTHANSA MARK

71. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 70 of this Complaint as though fully set forth herein.

72. This claim is for cancellation of United States Trademark Registration No. 1,871,600 for the alleged mark LUFTHANSA pursuant to 15 U.S.C. § 1119.

73. Defendant procured the Registration as a result of false allegations of material facts made to the United States Trademark Office during the prosecution of its application, which allegations Defendant made intentionally and knew or should have known were false. Accordingly, Defendant obtained the Registration through means of fraud.

74. FMA is likely to be damaged by U.S. Trademark Registration for LUFTHANSA (Reg. No. 1,871,600).

75. The registration is subject to cancellation pursuant to 15 U.S.C. § 1064.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FMA demands judgment against Defendant Lufthansa for:

A. a declaration of the Court that FMA's ownership of the Domain Name does not violate any rights owned by Defendant;

B. a declaration of the Court that any trademark rights in and to the phrase "lh" allegedly owned by Defendant are invalid, void and/or otherwise unenforceable

C. an injunction prohibiting Defendant from alleging or threatening that FMA's use of the Domain Name or the term "lh" does violate any federal, state, or common law trademark rights owned by Defendant, including without limitation, prohibiting Defendant from seeking transfer of the Domain Name via U.D.R.P. or any other means;

D. an injunction restraining and enjoining Defendant from tortiously interfering with FMA's prospective business relations;

E. cancellation of Defendant's U.S. Trademark Registration for LUFTHANSA (Reg. No. 1,871,600);

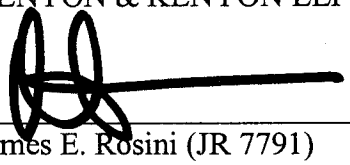
F. requiring Defendant to account and pay over to FMA all damages sustained by FMA;

G. an award of costs and reasonable attorneys' fees; and

H. such other and further relief as the Court may deem equitable and proper.

Dated: April 24, 2008

KENYON & KENYON LLP

By: 

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