



## NATIONAL ARBITRATION FORUM

### DECISION

Boston Green Goods Inc. v. Dealwave  
Claim Number: FA0711001115186

#### PARTIES

Complainant is **Boston Green Goods Inc.** ("Complainant"), represented by **Michael R. Scott**, of **Nixon Peabody LLP**, 100 Summer Street, Boston, MA 02110. Respondent is **Dealwave** ("Respondent"), PO Box 603, Columbia, MD 21045.

#### REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**allergybuyersclub.com**>, registered with **Fabulous.com Pty Ltd.**

#### PANEL

The undersigned certifies that he or she has acted independently and impartially and to the best of his or her knowledge has no known conflict in serving as Panelist in this proceeding.

Houston Putnam Lowry, Chartered Arbitrator, as Panelist.

#### PROCEDURAL HISTORY

Complainant submitted a Complaint to the National Arbitration Forum electronically on November 29, 2007; the National Arbitration Forum received a hard copy of the Complaint on November 30, 2007.

On November 29, 2007, Fabulous.com Pty Ltd. confirmed by e-mail to the National Arbitration Forum that the <**allergybuyersclub.com**> domain name is registered with Fabulous.com Pty Ltd. and that Respondent is the current registrant of the name. Fabulous.com Pty Ltd. has verified that Respondent is bound by the Fabulous.com Pty Ltd. registration agreement and has thereby agreed to resolve domain-name disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On December 5, 2007, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of December 26, 2007 by which Respondent could file a response to the Complaint, was transmitted to Respondent via e-mail, post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts, and to postmaster@allergybuyersclub.com by e-mail.

Having received no response from Respondent, the National Arbitration Forum transmitted to the parties a Notification of Respondent Default.

On January 4, 2008, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the National Arbitration Forum appointed Houston Putnam Lowry, Chartered Arbitrator, as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that the National Arbitration Forum has discharged its responsibility under Paragraph 2(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") "to employ reasonably available means calculated to achieve actual notice to Respondent." Therefore, the Panel may issue its decision based on the documents submitted and in accordance with the ICANN Policy, ICANN Rules, the National Arbitration Forum's Supplemental Rules and any rules and principles of law that the Panel deems applicable, without the benefit of any response from Respondent.

### **RELIEF SOUGHT**

Complainant requests that the domain name be transferred from Respondent to Complainant.

### **PARTIES' CONTENTIONS**

A. Complainant makes the following assertions:

This Complaint is based on Complainant Boston Green Goods, Inc.'s common law trademark rights in the mark ALLERGY BUYERS CLUB. Boston Green Goods, Inc. is a leading multi-channel retailer of healthy home products and allergy relief products. It has used the mark ALLERGY BUYERS CLUB since at least 1998 as a trademark to identify and distinguish the goods and services it provides in commerce. Throughout that time, the mark ALLERGY BUYERS CLUB has comprised the core of the domain name, allergybuyersclub.com, used by the website through which it markets its products online. Internet users can use the allergybuyersclub.com website to obtain information about the products and product lines offered by Boston Green Goods, Inc., and to purchase products.

The online business Complainant has built around the domain allergybuyersclub.com over the past decade has generated millions of dollars worth of retail sales to tens of thousands of customers. Complainant has been widely recognized as a leading online retailer by online reviewers and sites focused both on e-business in general, and on allergy and "green" issues, and by the popular press as well. *See, e.g.,* ePinions.com, "Compare Prices and Read Reviews on Allergy Buyer's Club at Epinions.com," available at [http://www1.epinions.com/pr-Online\\_Stores\\_Services-Allergy\\_Buyer\\_s\\_Club/sec\\_~opinion\\_list/pp\\_~1/pa\\_~1](http://www1.epinions.com/pr-Online_Stores_Services-Allergy_Buyer_s_Club/sec_~opinion_list/pp_~1/pa_~1) (last visited Nov. 21, 2007) (collecting reviews from individual customers dating back to January 2002); Glenn Haege, "Keeping your basement dry will help with preventing sicknesses," *masterhandyman.com* (March 20, 2004), available at <http://www.masterhandyman.com/printcol.cfm?pubdate=20040320> (last visited November 21, 2007) (reporting availability of dehumidifiers from

allergybuyersclub.com); Emily Shartin, "Woman fighting allergies lauded for online success," *Boston Globe* (October 21, 2004), available at [http://www.boston.com/news/local/articles/2004/10/21/woman\\_fighting\\_allergies\\_lauded\\_for\\_online\\_success?mode=PF](http://www.boston.com/news/local/articles/2004/10/21/woman_fighting_allergies_lauded_for_online_success?mode=PF) (last visited November 21, 2007) (profiling Complainant's founder after her nomination for a Stevie Award for women entrepreneurs, and projecting 2004 sales in excess of \$10 million to 50,000 customers); Planet Technologies, Inc., Form 10-KSB for the year ended December 31, 2004, 5 (listing Allergy Buyers Club as one of six competitors in the allergy avoidance product market), available at <http://www.sec.gov/Archives/edgar/data/896861/000095013705003948/a07155e10ksb.htm>.

On April 13, 2007, Complainant filed applications with the United States Patent and Trademark Office for federal registration of ALLERGYBUYERSCLUB.COM as applied to retail store services, mail order catalog services, telephone, and computer on-line retail services featuring allergy, environmental, and organic allergy and environmental products, among other categories.

## FACTUAL AND LEGAL GROUNDS

This Complaint is based on the following factual and legal grounds: ICANN Rule 3(b)(ix).

- [a.] As a result of Complainant's continuous and extensive use of the mark since 1998 in connection with substantial sales via its website, Complainant's ALLERGYBUYERSCLUB.COM mark has acquired secondary meaning sufficient to establish common law rights in the mark under Policy ¶4(a)(i). *See craigslist, Inc. v. Register by Proxy*, Nat. Arb. Forum Case No. FA0710001087532 (November 15, 2007). The domain name <**allergybuyersclub.com**> is confusingly similar to Boston Green Goods' trademark ALLERGYBUYERSCLUB.COM because it contains the mark in its entirety. The deliberate misspelling of the mark by inserting an extra "L" does not in any way avoid a likelihood of confusion. *Ganz v. Texas Int'l Prop. Assoc.*, FA 991778 (Nat. Arb. Forum, July 19, 2007) (holding WEBKINZZ.COM confusingly similar to WEBKINZ); *Popular Enterprises, LLC. v. Wan-Fu China, Ltd.*, FA 892424 (Nat. Arb. Forum, Mar. 1, 2007)(NETSSTER.COM confusingly similar to NETSTER); *Mattel, Inc. v. Digi Real Estate Foundation*, FA 783221 (Nat. Arb. Forum Oct., 9 2006) (MATTEL.COM confusingly similar to MATTEL). ICANN Rule 3(b)(ix)(1); ICANN Policy ¶ 4(a)(i).
- [b.] Respondent does not meet the criteria in Paragraph 4(c) of the ICANN Uniform Domain Name Dispute Resolution Policy for demonstrating rights or legitimate interests in the domain name <**allergybuyersclub.com**>. ICANN Rule 3(b)(ix)(2). ICANN Policy ¶4(a)(ii).

(i.) There is no indication that Respondent is using **<allergybuyersclub.com>** in connection with any bona fide offering of goods and services. Previously, the domain name directed traffic to a website offering pay-per-click links to numerous businesses and services, including Respondent's competitors. However, at present there is no active website associated with the domain name at all. It appears that Respondent may have disabled the website following receipt of Boston Green Goods' cease and desist letter, dated October 24, 2007.

(ii.) The WHOIS information associated with the domain name **<allergybuyersclub.com>** provides no indication that Respondent is now known by that name. There is no evidence that Respondent has ever been commonly known by the domain name **<allergybuyersclub.com>**.

(iii.) Respondent is in no way connected with Boston Green Goods and has no authority, license, or permission from Boston Green Goods to use the ALLERGYBUYERSCLUB.COM mark to identify Respondent's domain name, website, or services. Based on the fact that the domain name is an obvious misspelling of Boston Green Goods' trademark, it appears the Respondent intended to capture and profit from traffic from web surfers intending to use Boston Green Goods' website. Such practices are typical of typosquatting and thus further support Respondent's lack of rights and legitimate interests in the domain name. *See Ganz v. Texas Int'l Pro. Assoc.*, FA 991778 (Nat. Arb. Forum, July 19, 2007); *IndyMac Bank F.S.B. v. Ebeyer*, FA 175292 (Nat. Arb. Forum, Sept. 19, 2003) (finding that the respondent lacked rights and legitimate interests in the disputed domain names because it "engaged in the practice of typosquatting by taking advantage of Internet users who attempt to access Complainant's <indymac.com> website but mistakenly misspell Complainant's mark by typing the letter 'x' instead of the letter 'c'").

[c.] The domain name **<allergybuyersclub.com>** should be considered as having been registered and being used in bad faith. That Respondent has engaged in typosquatting, by registering a domain name that is identical to Boston Green Goods' mark, save for one mistyped character is evidence that Respondent has registered and used the domain name in bad faith. *See Ganz v. Texas Int'l Pro. Assoc.*, FA 991778 (Nat. Arb. Forum, July 19, 2007) ("Respondent's registration of typosquatted versions of Complainant's mark is also evidence of bad faith registration and use"); *Popular Enters., LLC. v. Wan-Fu China, Ltd.*, FA 892424 (Nat. Arb. Forum, Mar. 1, 2007); *Mattel, Inc. v. Digi Real Estate Foundation*, FA 783221 (Nat. Arb. Forum, Oct. 9, 2006) ("the fact that Respondent registered a typosquatted version of Complainant's mark is inherently evidence of bad faith registration and use"); *IndyMac Bank F.S.B. v. Ebeyer*, FA 175292 (Nat. Arb. Forum, Sept. 19, 2003); *see also Nat'l Ass'n of Prof'l Baseball Leagues, Inc. v. Zuccarini*, D2002-1011 (WIPO Jan. 21, 2003) ("Typosquatting is inherently

parasitic and of itself evidence of bad faith”) ICANN Rule 3(b)(ix)(3); ICANN Policy ¶4(a)(iii).

B. Respondent failed to submit a Response in this proceeding.

## **FINDINGS**

Complainant, Boston Green Goods Inc. is a leading multi-channel retailer of healthy home products and allergy relief products. Complainant has used the ALLERGY BUYERS CLUB mark in commerce since 1998 including the registration of the <allergybuyersclub.com> domain name. Recently, Complainant filed a servicemark application for the ALLERGY BUYERS CLUB service mark with the United States Patent and Trademark Office (“USPTO”) (Ser. No. 77/156,089 filed April 13, 2007).

Respondent registered the <allergybuyersclub.com> domain name on August 13, 2006. The domain name is not currently being actively used. Previously, the disputed domain name directed traffic to a website with various third-party links including those in direct competition with Complainant.

## **DISCUSSION**

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

In view of Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of Complainant's undisputed representations pursuant to paragraphs 5(e), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory. *See Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc.*, FA 95095 (Nat. Arb. Forum July 31, 2000) (holding that the respondent's failure to respond allows all reasonable inferences of fact in the allegations of the complaint to be deemed true); *see also Talk City, Inc. v. Robertson*, D2000-0009 (WIPO Feb. 29, 2000) (“In the absence of a response, it is appropriate to accept as true all allegations of the Complaint.”).

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

- (1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (2) Respondent has no rights or legitimate interests in respect of the domain name; and
- (3) the domain name has been registered and is being used in bad faith.

### **Identical and/or Confusingly Similar**

Under Policy ¶4(a)(i), Complainant is not required to hold a governmental trademark registration to establish rights in a mark. Common law rights are sufficient when a complainant demonstrates secondary meaning associated with a mark. *See McCarthy on Trademarks and Unfair Competition*, § 25:74.2 (4th ed. 2002) (The ICANN dispute resolution policy is “broad in scope” in that “the reference to a trademark or service mark ‘in which the complainant has rights’ means that ownership of a registered mark is not required—unregistered or common law trademark or service mark rights will suffice” to support a domain name Complaint under the Policy); *see also British Broad. Corp. v. Renteria*, D2000-0050 (WIPO Mar. 23, 2000) (noting that the Policy “does not distinguish between registered and unregistered trademarks and service marks in the context of abusive registration of domain names” and applying the Policy to “unregistered trademarks and service marks”).

In determining whether Complainant has common law rights in the ALLERGY BUYERS CLUB mark, the Panel considers Complainant’s factual claims raised in the Complaint. The Panel views the Complaint in a light most favorable to Complainant because it is uncontested. *See Bayerische Motoren Werke AG v. Bavarian AG*, FA 110830 (Nat. Arb. Forum June 17, 2002) (finding that in the absence of a Response the Panel is free to make inferences from the very failure to respond and assign greater weight to certain circumstances than it might otherwise do); *see also Desotec N.V. v. Jacobi Carbons AB*, D2000-1398 (WIPO Dec. 21, 2000) (finding that failing to respond allows a presumption that complainant’s allegations are true unless clearly contradicted by the evidence).

The Panel finds Complainant’s evidence establishes common law rights in the ALLERGY BUYERS CLUB mark sufficient to grant standing under the UDRP. The mark has become sufficiently distinct through Complainant’s continuous and ongoing use and exposure of the mark in the marketplace for almost ten years and Complainant has applied for a service mark registration with the USPTO. *See Tuxedos By Rose v. Nunez*, FA 95248 (Nat. Arb. Forum Aug. 17, 2000) (finding common law rights in a mark where its use was continuous and ongoing, and secondary meaning was established); *see also Keppel TatLee Bank v. Taylor*, D2001-0168 (WIPO Mar. 28, 2001) (“[O]n account of long and substantial use of [KEPPEL BANK] in connection with its banking business, it has acquired rights under the common law.”).

Respondent’s <**allergybuyersclub.com**> domain name is confusingly similar to Complainant’s ALLERGY BUYERS CLUB mark. Respondent’s disputed domain name includes Complainant’s mark in its entirety and adds an additional letter “l” and the generic top-level domain “.com.” Such alterations to Complainant’s mark are insufficient to distinguish the disputed domain name from Complainant’s mark. Thus, the Panel finds the disputed domain name is confusingly similar to Complainant’s mark pursuant to Policy ¶4(a)(i). *See Marriott Int’l, Inc. v. Seocho*, FA 149187 (Nat. Arb. Forum Apr. 28, 2003) (finding that the respondent’s <marrriott.com> domain name was confusingly similar to the complainant’s MARRIOTT mark); *see also Neiman Marcus*

*Group, Inc. v. Party Night, Inc.*, FA 114546 (Nat. Arb. Forum July 23, 2002) (finding that the <neimanmacus.com> domain name was a simple misspelling of the complainant's NEIMAN MARCUS mark and was a classic example of typosquatting, which was evidence that the domain name was confusingly similar to the mark); *see also Busy Body, Inc. v. Fitness Outlet Inc.*, D2000-0127 (WIPO Apr. 22, 2000) ("[T]he addition of the generic top-level domain (gTLD) name '.com' is . . . without legal significance since use of a gTLD is required of domain name registrants . . .").

The Panels concludes Complainant has satisfied Policy ¶4(a)(i).

### **Rights or Legitimate Interests**

Under Policy ¶4(a)(ii), Complainant must make a *prima facie* case Respondent has no rights or legitimate interests in the disputed domain name. The Panel finds Complainant has met this burden and accordingly, the burden is shifted to Respondent to demonstrate it has rights or legitimate interests in the disputed domain name. *See VeriSign Inc. Vene Sign, C.A.*, D2000-0303 (WIPO June 28, 2000) ("Respondent's default, however, does not lead to an automatic ruling for Complainant. Complainant still must establish a *prima facie* case showing that under the Uniform Domain Name Disputed Resolution Policy it is entitled to a transfer of the domain name."); *see also Do The Hustle, LLC v. Tropic Web*, D2000-0624 (WIPO Aug. 21, 2000) (holding that once the complainant asserts that the respondent has no rights or legitimate interests with respect to the domain, the burden shifts to the respondent to provide "concrete evidence that it has rights to or legitimate interests in the domain name at issue"); *see also G.D. Searle v. Martin Mktg.*, FA 118277 (Nat. Arb. Forum Oct. 1, 2002) ("Because Complainant's Submission constitutes a *prima facie* case under the Policy, the burden effectively shifts to Respondent.").

Respondent's failure to submit a response to the Complaint allows the Panel to assume Respondent has no rights or legitimate interests in the <**allergybuyersclub.com**> domain name. *See G.D. Searle v. Martin Mktg.*, FA 118277 (Nat. Arb. Forum Oct. 1, 2002) ("Respondent's failure to respond means that Respondent has not presented any circumstances that would promote its rights or legitimate interests in the subject domain name under Policy ¶4(a)(ii)."); *see also Bank of Am. Corp. v. McCall*, FA 135012 (Nat. Arb. Forum Dec. 31, 2002) ("Respondent's failure to respond not only results in its failure to meet its burden, but also will be viewed as evidence itself that Respondent lacks rights and legitimate interests in the disputed domain name."). However, the Panel will examine the record with respect to the factors listed in Policy ¶4(c) before making this determination.

Nowhere in Respondent's WHOIS information does it indicate Respondent is commonly known by the <**allergybuyersclub.com**> name. There is also no information in the record to indicate Respondent is or ever has been known by the disputed domain name. Complainant has not granted permission to use the ALLERGY BUYERS CLUB mark in any way. Therefore, the Panel finds Respondent is not commonly known by the disputed

domain name pursuant to Policy ¶4(c)(ii). *See Gallup, Inc. v. Amish Country Store*, FA 96209 (Nat. Arb. Forum Jan. 23, 2001) (finding that the respondent does not have rights in a domain name when the respondent is not known by the mark); *see also Compagnie de Saint Gobain v. Com-Union Corp.*, D2000-0020 (WIPO Mar. 14, 2000) (finding no rights or legitimate interest where the respondent was not commonly known by the mark and never applied for a license or permission from the complainant to use the trademarked name).

Respondent previously used the <**allergybuyersclub.com**> domain name to host a website featuring third-party links, some in direct competition with Complainant. The Panel finds that such use is not a *bona fide* offering of goods or services under Policy ¶4(c)(i) or a legitimate noncommercial or fair use under Policy ¶4(c)(iii). *See DLJ Long Term Inv. Corp. v. BargainDomainNames.com*, FA 104580 (Nat. Arb. Forum Apr. 9, 2002) (“Respondent is not using the disputed domain name in connection with a bona fide offering of goods and services because Respondent is using the domain name to divert Internet users to <visual.com>, where services that compete with Complainant are advertised.”); *see also Ameritrade Holdings Corp. v. Polanski*, FA 102715 (Nat. Arb. Forum Jan. 11, 2002) (finding that the respondent’s use of the disputed domain name to redirect Internet users to a financial services website, which competed with the complainant, was not a *bona fide* offering of goods or services).

Currently, the disputed domain name is not being actively used. There are good policy reasons to hold the UDRP cannot be avoided by “inactively” holding a domain name. The Panel finds that a non-active use is not a *bona fide* offering of goods or services under Policy ¶4(c)(i) or a legitimate noncommercial or fair use under Policy ¶4(c)(iii). *See TMP Int’l, Inc. v. Baker Enters.*, FA 204112 (Nat. Arb. Forum Dec. 6, 2003) (“[T]he Panel concludes that Respondent's non-active use of the domain name does not establish rights or legitimate interests pursuant to Policy ¶4(a)(ii).”); *see also Am. Home Prods. Corp. v. Malgioglio*, D2000-1602 (WIPO Feb. 19, 2001) (finding no rights or legitimate interests in the domain name <solgarvitamins.com> where the respondent did not make any active use of the domain name).

The Panels concludes Complainant has satisfied Policy ¶4(a)(ii).

### **Registration and Use in Bad Faith**

The <**allergybuyersclub.com**> domain name is confusingly similar to Complainant’s mark and previously resolved to a third-party links page. The Panel assumes Respondent was financially benefitting from the confusion between the disputed domain name and Complainant’s mark. Consequently, the Panel finds further evidence of Respondent’s bad faith registration and use of the disputed domain name pursuant to Policy ¶4(b)(iv). *See Gardens Alive, Inc. v. D&S Linx*, FA 203126 (Nat. Arb. Forum Nov. 20, 2003) (“Respondent registered and used the <my-seasons.com> domain name in bad faith pursuant to Policy ¶4(b)(iii) and (iv) because Respondent is using a domain name that is confusingly similar to the MYSEASONS mark for commercial benefit by diverting

Internet users to the <thumbgreen.com> website, which sells competing goods and services.”); *see also Associated Newspapers Ltd. v. Domain Manager*, FA 201976 (Nat. Arb. Forum Nov. 19, 2003) (“Respondent’s prior use of the <mailonsunday.com> domain name is evidence of bad faith pursuant to Policy ¶4(b)(iv) because the domain name provided links to Complainant’s competitors and Respondent presumably commercially benefited from the misleading domain name by receiving ‘click-through-fees.’”).

Currently, Respondent is not actively using the disputed domain name. This alone cannot avoid a finding of bad faith. The Panel finds a non-active use is evidence of bad faith registration and use under Policy ¶4(a)(iii). *See DCI S.A. v. Link Commercial Corp.*, D2000-1232 (WIPO Dec. 7, 2000) (concluding that the respondent’s non-active use of the domain name satisfies the requirement of ¶4(a)(iii) of the Policy); *see also Caravan Club v. Mrgsale*, FA 95314 (Nat. Arb. Forum Aug. 30, 2000) (finding that the respondent made no use of the domain name or website that connects with the domain name, and that non-active use of a domain name permits an inference of registration and use in bad faith).

The Panels concludes Complainant has satisfied Policy ¶4(a)(iii).

## **DECISION**

Having established all three elements required under the ICANN Policy, the Panel concludes that relief shall be **GRANTED**.

Accordingly, it is Ordered that the <**allergybuyersclub.com**> domain name be **TRANSFERRED** from Respondent to Complainant.



\_\_\_\_\_  
Houston Putnam Lowry, Esq.  
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist  
Dated: Sunday, January 15, 2008

[Click Here](#) to return to the main Domain Decisions Page.

[Click Here](#) to return to our Home Page

**NATIONAL ARBITRATION FORUM**