



NATIONAL ARBITRATION FORUM

DECISION

Savannaceuticals LLC v. cenal.com ltd and cenal.com
Claim Number: FA0911001293748

PARTIES

Complainant is **Savannaceuticals LLC** ("Complainant"), represented by **Carl M. Davis**, of **Baker Donelson Bearman Caldwell & Berkowitz PC**, Georgia, USA. Respondent is **cenal.com ltd and cenal.com** ("Respondent"), Hong Kong.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**newyouthmedicalspa.com**>, registered with **Black Ice Domains, Inc.**

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 9, 2009; the National Arbitration Forum received a hard copy of the Complaint on November 10, 2009.

On November 15, 2009, Black Ice Domains, Inc confirmed by e-mail to the National Arbitration Forum that the <**newyouthmedicalspa.com**> domain name is registered with Black Ice Domains, Inc and that Respondent is the current registrant of the name. Black Ice Domains, Inc has verified that Respondent is bound by the Black Ice Domains, Inc 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 November 18, 2009, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of December 8, 2009 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@newyouthmedicalspa.com by e-mail.

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

On December 15, 2009, 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:

Complainant bases this Complaint upon its rights in the well-known marks NEW YOUTH as used in association with "skin treatment preparations and lotions, namely, skin washes, skin toner, skin bleacher, hydrating spray, hydrating cream, skin smoothing gel and sun screen," "medicated skin treatment lotions, namely, depigmentation cream and cream for reducing skin irritation" and its common-law rights in the mark NEW YOUTH MEDICAL SPA as used on spa services. Rights in the mark for goods are reflected in U.S. Reg. Nos. 2181346 and 2181347. Complainant acquired the NEW YOUTH trademarks and registrations through assignment dated July 31, 2007 (recorded in the US Patent and Trademark Office at Reel/Frame 3629/0008. Complainant acquired the NEW YOUTH MEDICAL SPA trademark by assignment. Complainant's registrations are valid and subsisting in law, were duly and legally issued, are prima facie evidence of the validity of the marks registered and constitute constructive notice of Complainant's ownership of the marks.

FACTUAL AND LEGAL GROUNDS

Factual Background

Complainant and its Well-Known NEW YOUTH Marks

Complainant's predecessor first began offering skincare products under the NEW YOUTH mark at least as early as 1998 when Dr. E. Ronald Finger first developed skin treatment preparations sold under the NEW YOUTH mark. Prior to the introduction of the skincare products, in 1996, Dr. Finger built the NEW YOUTH MEDICAL SPA, a Savannah, Georgia day

spa, upon the solid foundation of Dr. Finger's medical practice as one of the preeminent plastic surgery practices in the Southeast.

Savannah's New Youth Medical Spa works in symbiosis with Dr. Finger's medical practice to endow its patients with premium skin care treatments and medical and day spa amenities in a clean, professional, and relaxing environment. The New Youth Medical Spa offers everything from its exclusive New Youth Skin Care Treatment System, to relaxing massages, Tri-active treatments, Titan™ laser skin rejuvenation, the Laser Genesis and other skin care treatments specifically designed to aid in the preparation and recovery of plastic surgery patients.

In support of its goods and services sold under the NEW YOUTH mark, Complainant operates a web site at <www.newyouthspa.com> (which is redirected without input by the user to <http://www.fingerandassociates.com/html/new-youth-spa.html>). Complainant's New Youth Medical Spa website displays the NEW YOUTH and NEW YOUTH MEDICAL SPA marks.

Respondent and its Unlawful Activities

In October 2009, it came to Complainant's attention that the newyouthmedicalspa.com site was being used as a means for Respondent to create advertising revenue by causing confusion with Complainant's NEW YOUTH trademarks. Complainant's customers who type the name of Complainant's spa "newyouthmedicalspa.com" into an internet browser are directed to a site that appears to be a spa website, but which merely sends the user to advertising search results (in certain cases consisting of pornography sites) when any of the hypertext links are clicked. This site makes it appear to Complainant's customers that Complainant is no longer operating its day spa and is irreparably damaging Complainant and the goodwill developed by Complainant through long use of the NEW YOUTH trademarks in association with its goods and services.

Argument

Pursuant to the ICANN Policy, Complainant must establish the following to obtain the relief it requests in this action: (1) that the domain name at issue is identical or confusingly similar to a trademark or service mark in which Complainant owns rights; (2) that Respondent has no rights or legitimate interests in the domain name; and (3) that Respondent has registered and used the domain name in bad faith.

The newyouthmedicalspa.com Domain Name is Identical or Confusingly Similar to Complainant's NEW YOUTH Mark

As a result of Complainant's continuous use of NEW YOUTH since at least as early as 1998, as well as its common-law uses for the various trademarks and service marks incorporating NEW YOUTH listed above, Complainant owns valid and enforceable rights in the mark NEW

YOUTH and NEW YOUTH MEDICAL SPA. Complainant acquired those rights well before October 25, 2008, which is the date that the Respondent obtained the domain name.

The confusing similarity between NEWYOUTHMEDICALSPA.COM and Complainant's NEW YOUTH and NEW YOUTH MEDICAL SPA marks is apparent, as the domain name is nearly identical to the NEW YOUTH MEDICAL SPA mark, with the exception of the addition of the generic top level domain ".com." It is well settled that the addition of the generic top level domain ".com" is inconsequential when considering whether a domain name is identical or confusingly similar. See The American Automobile Association, Inc. v Zag Media Corp. c/o Whois Privacy Services, FA0809001226952 (NAF November 13, 2008). Respondent's use of the domain name for a website dedicated to advertising beauty goods and services is an obvious attempt to trade on the NEW YOUTH and NEW YOUTH MEDICAL SPA marks, and consumers who encounter the domain name will almost certainly mistakenly believe that the site is owned by – or affiliated or associated with – Complainant.

Respondent Has No Rights or Legitimate Interest in the
NEWYOUTHMEDICALSPA.COM Domain Name

Respondent's registration and use of the NEWYOUTHMEDICALSPA.COM domain name in association with the advertisement of spa and skin care products is a blatant attempt to trade on the goodwill associated with Complainant's NEW YOUTH and NEW YOUTH MEDICAL SPA trademarks and service marks. Respondent has no connection or affiliation with Complainant of any kind, nor has Respondent at any time received a license or consent, express or implied, to use the NEW YOUTH or NEW YOUTH MEDICAL SPA marks in a domain name or in any other manner. Upon information and belief, Respondent is not commonly known by the mark NEW YOUTH or NEW YOUTH MEDICAL SPA.

Respondent was on notice of Complainant's rights in the NEW YOUTH mark at the time it registered the domain name as a result of Complainant's trademark registrations and Complainant's prior extensive use of the NEW YOUTH and NEW YOUTH MEDICAL SPA marks. Nevertheless, Respondent has attempted to profit from the NEW YOUTH and NEW YOUTH MEDICAL SPA marks by using the NEWYOUTHMEDICALSPA.COM domain name to redirect Internet users to its own commercial website. Such use does not constitute a bona fide offering of goods or services nor a legitimate noncommercial or fair use under the Policy. See The American Automobile Association, Inc. v Zag Media Corp. c/o Whois Privacy Services, FA0809001226952 (NAF November 13, 2008) (finding no rights or legitimate interests in the domain name <aaacars.com> where respondent used the domain name for a pay per click advertising site for automobile-related products and services); Bank of America Corporation v. Northwest Free Community Access, FA0308000180704 (NAF Sept. 30, 2003) (stating that respondent's demonstrated intent to divert Internet users seeking complainant's website to a website of respondent and for respondent's benefit is not a bona fide offering of goods or services under Policy ¶ 4(c)(i) nor is it a legitimate noncommercial or fair use under Policy ¶ 4(c)(iii)).

Respondent Registered and is Using the Domain Name in Bad Faith

By using the domain name, Respondent has intentionally attempted to attract, for commercial gain, Internet users to Respondent's <NEWYOUTHMEDICALSPA.COM> web site by creating a likelihood of confusion with the Complainant's NEW YOUTH mark as to the source, sponsorship, affiliation, or endorsement of Respondent's web site and/or of the goods and services made available through Respondent's web site. The <newyouthmedicalspa.com> home page contains the prominent wording "Spa treatments and restorative services in partnership with medical professionals." The site contains several categories from which users may select when choosing medical spa services, including "Serious Skin Care, Face Lift, Breast Augmentation, Breast Implants, Mole Removal, Rhinoplasty, Body Wraps, Cosmetic Surgery, Medical Spa, Anti Aging, Chemical Peels, Laser Treatments, Liposuction, Vein Treatment, Eczema." When one clicks, for example, on "Breast Augmentation," one is taken to the website <<http://www.newyouthmedicalspa.com/hc3.asp>> which includes hypertext links to the following items: Free Porn, Nudity, Free Sex Stories, Hardcore Sex, Hot Sex, Free Porn Sites and more. Similarly, when one clicks on "Breast Implants," one is taken to the same website as for Breast Augmentation, <<http://www.newyouthmedicalspa.com/hc3.asp>>, which also includes the same links to the same pornography sites as the hyperlink for Breast Augmentation.

The remaining hyperlinks lead the user to sites that include advertisements for related goods and services: For "Mole Removal," one is taken to the web site <<http://newyouthmedicalspa.com/hc3.asp>> where one can click on advertisements for mole removal. Similarly, if one clicks on "Rhinoplasty," one is taken to the web site <<http://newyouthmedicalspa.com/hc3.asp>>, where one can click on advertisements for rhinoplasty providers. Clicking on any hypertext link on Respondent's <newyouthmedicalspa.com> website takes users to advertisements for related goods and services.

Presumably, Respondent earns referral fees when a user visits the sites to which the <newyouthmedicalspa.com> web site is linked. As such, Respondent is profiting from the goodwill associated with Complainant's NEW YOUTH and NEW YOUTH MEDICAL SPA marks. Given Complainant's longstanding use of the NEW YOUTH marks and Complainant's notoriety in its field as a result of such use, Respondent must have been aware of Complainant's rights in the NEW YOUTH and NEW YOUTH MEDICAL SPA marks at the time it registered and began using the domain name and, in fact, registered and began using the domain name for a beauty related site for the purpose of creating a likelihood of confusion with Complainant's NEW YOUTH and NEW YOUTH MEDICAL SPA marks. Accordingly, Respondent has registered and used the domain name in bad faith. See The University of Houston System v. Salvia Corporation, FA0602000637920 (NAF Mar. 21, 2006) (finding that respondent used the disputed domain name to operate a website which featured links to competing and non-competing commercial websites from which respondent presumably received referral fees and holding such use for respondent's own commercial gain to be evidence of bad faith registration and use pursuant to Policy ¶ 4(b)(iv)); Choice Hotels International, Inc. v. domains, ventures c/o domains Ventures, FA0902001249532 (NAF April 16, 2009) (finding evidence of bad faith use and registration where the domain name was associated with a web site that displayed links to sites related to and in direct competition with complainant's business and noting that the Panel

was permitted to make an inference that respondent received either pay-per-click or advertising fees for those advertisements).

B. Respondent failed to submit a formal Response in this proceeding. However, Respondent submitted an email claiming the disputed domain name has been transferred to the Complainant despite the registrar lock on it (which should be impossible).

FINDINGS

Complainant, Savannaceuticals LLC, manufactures and markets skin-care products under the NEW YOUTH mark, which Complainant registered with the United States Patent and Trademark Office (“USPTO”) on August 11, 1998 (Reg. No. 2,181,346). Complainant has been using the NEW YOUTH mark continuously in commerce since at least as early as 1998 to promote its line of skin care products.

Respondent, cenal.com ltd and cenal.com, registered the <**newyouthmedicals.com**> domain name on October 25, 2008. The disputed domain name resolves to a website that contains links to third-party websites, some of which belong to competitors of 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."

On November 18, 2009 the National Arbitration Forum received an e-mail from Respondent. Because there was no indication Respondent considers the e-mail its formal Response, it is treated as an Other Correspondence and not a Response. While the Panel is under no obligation to acknowledge any such documents, the circumstances of this case and the interests of justice require the Panel to read and consider this particular email. In the email, Respondent consents to the transfer the <**newyouthmedicals.com**> domain name to Complainant, and contends the transfer has already occurred.

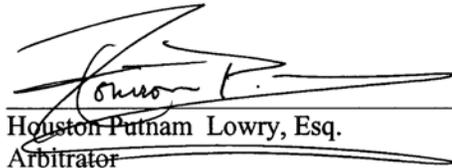
However, after the initiation of this proceeding, Black Ice Domains, Inc placed a hold on Respondent’s account and therefore Respondent cannot transfer the disputed domain name while this proceeding is still pending. In a circumstance such as this, where Respondent has not contested the transfer of the disputed domain name but instead agrees to transfer the domain name in question to Complainant, the Panel has decided to forego the traditional UDRP analysis and order an immediate transfer of the <**newyouthmedicals.com**> domain name. *See Boehringer Ingelheim Int’l GmbH v. Modern Ltd. – Cayman Web Dev.*, FA 133625 (Nat. Arb. Forum Jan. 9, 2003) (transferring the domain name registration where the respondent stipulated to the transfer); *see also Malev Hungarian Airlines, Ltd. v. Vertical Axis Inc.*, FA 212653 (Nat Arb. Forum Jan. 13, 2004) (“In this case, the parties have both asked for the domain

name to be transferred to the Complainant . . . Since the requests of the parties in this case are identical, the Panel has no scope to do anything other than to recognize the common request, and it has no mandate to make findings of fact or of compliance (or not with the Policy.”); *see also Disney Enters., Inc. v. Morales*, FA 475191 (Nat. Arb. Forum June 24, 2005) (“[U]nder such circumstances, where Respondent has agreed to comply with Complainant’s request, the Panel felt it to be expedient and judicial to forego the traditional UDRP analysis and order the transfer of the domain names.”). Essentially, the Respondent admits all of the allegations of the amended complaint.

DECISION

The parties agreeing that all three elements required under the ICANN Policy exist, the Panel concludes without further analysis that the requested relief shall be **GRANTED**.

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



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: December 26, 2009

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