



NATIONAL ARBITRATION FORUM

DECISION

Briefing.com, Inc v. Marco Dalonzo
Claim Number: FA0701000888093

PARTIES

Complainant is **Briefing.com, Inc** ("Complainant"), represented by **Melise R. Blakeslee**, of **McDermott Will & Emery LLP**, 600 13th Street, N.W., Washington, DC 20005. Respondent is **Marco Dalonzo** ("Respondent"), 6950 Winter Hawk Cir, Colorado Springs, CO 800919.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**otcbriefing.com**>, registered with **DomainPeople 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 January 12, 2007; the National Arbitration Forum received a hard copy of the Complaint on January 15, 2007.

On January 15, 2007, DomainPeople Inc. confirmed by e-mail to the National Arbitration Forum that the <**otcbriefing.com**> domain name is registered with DomainPeople Inc. and that Respondent is the current registrant of the name. DomainPeople Inc. has verified that Respondent is bound by the DomainPeople 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 January 18, 2007, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of February 7, 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@otcbriefing.com by e-mail.

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

On February 13, 2006, 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:

1. Respondent's <**otcbriefing.com**> domain name is confusingly similar to Complainant's BRIEFING.COM mark.
2. Respondent does not have any rights or legitimate interests in the <**otcbriefing.com**> domain name.
3. Respondent registered and used the <**otcbriefing.com**> domain name in bad faith.

B. Respondent failed to submit a timely Response in this proceeding. However, Respondent submitted a late response on February 14, 2007. Despite its lateness, the Panel has elected to consider the following response because its decision has not yet been written:

Gentlemen,

The reason we haven't responded to your email is because we don't use the site often, if at all, and rarely check email as we don't market the site and have no communication with the email. We have cancelled the site as you will see below. We have no use for the site anyway as we are not looking to capture any of briefing.com likeness and didn't and still don't understand how otcbriefing.com infringes on breifing.com copywrite [sic]. In any case, we don't/didn't understand the laws pertaining to (available)

domain names that can be purchased on the open market. The site will be shut down on 3-1-07 ...see below

Your account has been cancelled. If your account balance has been paid in full, your web site will remain enabled until 03/01/2007 (you next bill date). After this date your account will be disabled. Your web site and email accounts will no longer be available on the Internet.

Cancellation Code c6067090-20070214-netid

FINDINGS

Complainant, Briefing.com, Inc., provides market commentary and analysis of the U.S. stock market to individual and professional investors. Specifically, Complainant provides stock quotations, financial market commentaries, earnings reports, economic and market forecasts, market sector ratings, and live investment analysis. Complainant has registered several marks for use in connection with the provision of these financial services, including the BRIEFING.COM mark registered with the United States Patent and Trademark Office ("USPTO") (Reg. No. 2,251,250 issued June 8, 1999). This mark has become incontestable.

Respondent registered the <otcbriefing.com> domain name on January 7, 2005. Respondent's domain name resolves to a website that offers competing financial analysis and market commentary.

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."

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

Complainant has established rights in the BRIEFING.COM mark through registration with the USPTO. *See Vivendi Universal Games v. XBNetVentures Inc.*, FA 198803 (Nat. Arb. Forum Nov. 11, 2003) ("Complainant's federal trademark registrations establish Complainant's rights in the BLIZZARD mark."); *see also Janus Int'l Holding Co. v.*

Rademacher, D2002-0201 (WIPO Mar. 5, 2002) ("Panel decisions have held that registration of a mark is *prima facie* evidence of validity, which creates a rebuttable presumption that the mark is inherently distinctive.").

Complainant contends Respondent's <otcbriefing.com> domain name is confusingly similar to Complainant's mark. Respondent's domain name contains Complainant's BRIEFING.COM mark in its entirety and adds the letters "otc," a common abbreviation for the phrase "over-the-counter" (which is a common phrase in the financial markets). The Panel concludes Respondent has failed to sufficiently distinguish its <otcbriefing.com> domain name from Complainant's mark for purposes of Policy ¶ 4(a)(i), particularly since they operate in the same business category (providing investment advice). *See Kelson Physician Partners, Inc. v. Mason*, CPR003 (CPR 2000) (finding that <kelsonmd.com> is identical or confusingly similar to the complainant's federally registered service mark, KELSON); *see also Am. Online, Inc. v. Tencent Commc'ns Corp.*, FA 93668 (Nat. Arb. Forum Mar. 21, 2000) (finding that <oicq.net> and <oicq.com> are confusingly similar to the complainant's mark, ICQ). While some might not find the <otcbriefing.com> domain name confusing, Complainant's targeted market will find it confusing.

The Panel finds Policy ¶ 4(a)(i) satisfied.

Rights or Legitimate Interests

Complainant contends Respondent lacks all rights or legitimate interests in the <otcbriefing.com> domain name. In instances where Complainant has made a *prima facie* case under Policy ¶ 4(a)(ii), the burden shifts to Respondent to set forth concrete evidence that it does possess rights or legitimate interests in the disputed domain name. *See Do The Hustle, LLC v. Tropic Web*, D2000-0624 (WIPO Aug. 21, 2000) (holding that, where the complainant has asserted that the respondent has no rights or legitimate interests with respect to the domain name, it is incumbent on the respondent to come forward with concrete evidence rebutting this assertion because this information is "uniquely within the knowledge and control of the respondent").

Complainant contends Respondent is using the <otcbriefing.com> domain name to operate a website that provides competing financial analysis and market commentary relating to the American stock markets. Respondent essentially admits this in its response. The Panel finds Respondent's competing use of the confusingly similar domain name is neither a *bona fide* offering of goods or services pursuant to Policy ¶ 4(c)(i) nor a legitimate noncommercial or fair use pursuant to Policy ¶ 4(c)(iii). *See Yahoo! Inc. v. Web Master*, FA 127717 (Nat. Arb. Forum Nov. 27, 2002) (finding that the respondent's use of a confusingly similar domain name to operate a pay-per-click search engine, in competition with the complainant, was not a *bona fide* offering of goods or services); *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).

Complainant further contends Respondent is not commonly known by the <otcbriefing.com> domain name. Respondent's WHOIS information lists Respondent as "Marco Dalonzo," who is apparently employed by First Equity Group, LLC. No evidence has been submitted showing that Respondent is licensed to register domain names featuring Complainant's mark. The Panel finds Respondent has not established rights or legitimate interests pursuant to Policy ¶ 4(c)(ii). *See Ian Schragger Hotels, L.L.C. v. Taylor*, FA 173369 (Nat. Arb. Forum Sept. 25, 2003) (finding that without demonstrable evidence to support the assertion that a respondent is commonly known by a domain name, the assertion must be rejected); *see also Charles Jourdan Holding AG v. AAJM*, D2000-0403 (WIPO June 27, 2000) (finding no rights or legitimate interests where (1) the respondent is not a licensee of the complainant; (2) the complainant's prior rights in the domain name precede the respondent's registration; (3) the respondent is not commonly known by the domain name in question).

The Panel finds Policy ¶ 4(a)(ii) satisfied.

Registration and Use in Bad Faith

Complainant submits evidence of Respondent's use of the <otcbriefing.com> domain name for the purpose of offering financial services in direct competition with those legitimately provided by Complainant. Read liberally, Respondent seems to admit this allegation in its belated answer. The Panel finds such use to be clear evidence of an intent to disrupt Complainant's business for Respondent's own benefit and results in a finding of bad faith registration and use pursuant to Policy ¶ 4(b)(iii). *See S. Exposure v. S. Exposure, Inc.*, FA 94864 (Nat. Arb. Forum July 18, 2000) (finding that the respondent registered the domain name in question to disrupt the business of the complainant, a competitor of the respondent); *see also Travant Solutions, Inc. v. Cole*, FA 203177 (Nat. Arb. Forum Dec. 6, 2003) ("Respondent registered and used the domain name in bad faith, pursuant to Policy ¶ 4(b)(iii), because it is operating on behalf of a competitor of Complainant . . .").

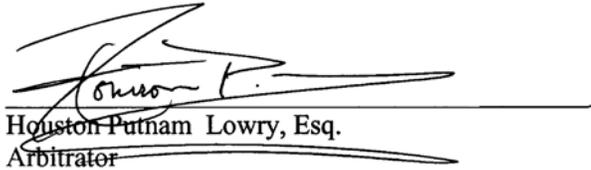
Internet users will likely be confused as to Complainant's sponsorship of or affiliation with the <otcbriefing.com> domain name when entering Respondent's websites. The Panel finds such use is further evidence of Respondent's bad faith registration and use pursuant to Policy ¶ 4(b)(iv). *See Am. Univ. v. Cook*, FA 208629 (Nat. Arb. Forum Dec. 22, 2003) ("Registration and use of a domain name that incorporates another's mark with the intent to deceive Internet users in regard to the source or affiliation of the domain name is evidence of bad faith."); *see also Drs. Foster & Smith, Inc. v. Lalli*, FA 95284 (Nat. Arb. Forum Aug. 21, 2000) (finding bad faith where the respondent directed Internet users seeking the complainant's site to its own website for commercial gain).

The Panel finds Policy ¶ 4(a)(iii) satisfied.

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 <**otcbriefing.com**> domain name be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: February 27, 2007

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