



NATIONAL ARBITRATION FORUM

DECISION

Roex Inc. v. Ira Dember
Claim Number: FA0708001059749

PARTIES

Complainant is **Roex Inc.** ("Complainant"), represented by **Jay H. Geller**, of **Jay H. Geller, a Prof. Corp.**, West Tower Suite 4000, 2425 W. Olympic Bl., Santa Monica, CA 90404. Respondent is **Ira Dember** ("Respondent"), 2144 Colquitt St, Houston, TX 77098, USA.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**truthaboutnutrition.com**>, registered with **Schlund+Partner Ag**.

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 August 9, 2007; the National Arbitration Forum received a hard copy of the Complaint on August 10, 2007.

On August 13, 2007, Schlund+Partner Ag confirmed by e-mail to the National Arbitration Forum that the <**truthaboutnutrition.com**> domain name is registered with Schlund+Partner Ag and that Respondent is the current registrant of the name. Schlund+Partner Ag has verified that Respondent is bound by the Schlund+Partner Ag 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 August 23, 2007, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of September 12, 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@truthaboutnutrition.com by e-mail.

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

On September 19, 2007, 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:

THE TRUTH ABOUT NUTRITION is registered to Complainant in the United States Patent and Trademark Office for educational and entertainment services, namely continuing radio and informational programs and seminars in the fields of health, nutrition, exercise, healthy lifestyles, physical fitness, weight control and management, behavior modification, dietary supplements, diet, emotional well-being and care of the skin, hair and nails. The mark was first used in April, 2002. The registration was issued on March 15, 2005, Registration Number 2,934,179.

FACTUAL AND LEGAL GROUNDS

- [a.] The domain name(s) is identical or confusingly similar to Roex' registered trademark THE TRUTH ABOUT NUTRITION in which the Complainant has rights. ICANN Rule 3(b)(ix)(1); ICANN Policy ¶4(a)(i).
- [b.] Respondent (domain-name holder) should be considered as having no rights or legitimate interests in respect of the domain name(s) that is/are the subject of the complaint because Respondent is just squatting on the name and not using it for anything, preventing Complainant from using the domain name in connection with its registered trademark. ICANN Rule 3(b)(ix)(2); ICANN Policy ¶4(a)(ii).

To Complainant's knowledge, Respondent has made no use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services.

To Complainant's knowledge, Respondent (as an individual, business, or other organization) has not been commonly known by the domain name.

To Complainant's knowledge, Respondent is not making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

- [c.] The domain name could be considered as having been registered and being used in bad faith since Respondent knew or should have known of Complainant's prior trademark rights prior to registering the domain name. ICANN Rule 3(b)(ix)(3); ICANN Policy ¶4(a)(iii).

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

FINDINGS

Complainant Roex Inc. holds a trademark registration with the United States Patent and Trademark Office for the THE TRUTH ABOUT NUTRITION mark (Reg. No. 2,934,179 issued March 15, 2005). Respondent utilizes the mark in connection with education and entertainment services, namely continuing radio and informational programs and seminars in the fields of health, nutrition, exercise, healthy lifestyles, physical fitness, weight control and management, behavior modification, dietary supplements, diet, emotional well-being and care of the skin, hair and nails.

Respondent registered the <truthaboutnutrition.com> domain name on April 10, 2007. The disputed domain name resolves to a "test" website.

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

The Panel finds Complainant’s registration of the THE TRUTH ABOUT NUTRITION mark with the USPTO sufficiently establishes its rights in the mark under Policy ¶4(a)(i). *See Innomed Techs., Inc. v. DRP Servs.*, FA 221171 (Nat. Arb. Forum Feb. 18, 2004) (“Registration of the NASAL-AIRE mark with the USPTO establishes Complainant's rights in the mark.”); *see also Men’s Wearhouse, Inc. v. Wick*, FA 117861 (Nat. Arb. Forum Sept. 16, 2002) (“Under U.S. trademark law, registered marks hold a presumption that they are inherently distinctive [or] have acquired secondary meaning.”).

Respondent’s <**truthaboutnutrition.com**> domain name is confusingly similar to Complainant’s THE TRUTH ABOUT NUTRITION mark, as it incorporates the dominant features of Complainant’s mark and simply omits the article “the.” In addition, the inclusion of the generic top-level domain “.com” in the disputed domain name is irrelevant, as a top-level domain is a required element of all domain names. Thus, the Panel finds the <**truthaboutnutrition.com**> domain name is confusingly similar to Complainant’s THE TRUTH ABOUT NUTRITION mark pursuant to Policy ¶4(a)(i). *See Buffalo News v. Barry*, FA 146919 (Nat. Arb. Forum Mar. 31, 2003) (finding the respondent's <bufalonews.com> domain name confusingly similar to Complainant's THE BUFFALO NEWS mark); *see also Antoun v. Truth Squad*, FA 114766 (Nat. Arb. Forum Aug. 21, 2002) (stating that the article "the" is "often added only for grammatical purposes, and may be superfluous to the name itself"); *see also Isleworth Land Co. v. Lost in Space, SA*, FA 117330 (Nat. Arb. Forum Sept. 27, 2002) (“[I]t is a well established principle that generic top-level domains are irrelevant when conducting a Policy ¶4(a)(i) analysis.”).

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

Rights or Legitimate Interests

Complainant alleges Respondent lacks rights and legitimate interests in the <**truthaboutnutrition.com**> domain name. Under Policy ¶4(a)(ii), Complainant has the

initial burden of proving this allegation. However, once Complainant has made a *prima facie* case, the burden shifts to Respondent to show he has rights or legitimate interests in the disputed domain name. The Panel finds Complainant has made a *prima facie* case under the Policy. 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”).

Respondent’s failure to answer the Complaint allows the Panel to presume Respondent lacks rights and legitimate interests in the disputed domain name. See *American Express Co. v. Fang Suhendro*, FA 129120 (Nat. Arb. Forum Dec. 30, 2002) (“[B]ased on Respondent’s failure to respond, it is presumed that Respondent lacks all rights and legitimate interests in the disputed domain name.”); see also *Talk City, Inc. v. Robertson*, D2000-0009 (WIPO Feb. 29, 2000) (“Given Respondent’s failure to submit a substantive answer in a timely fashion, the Panel accepts as true all of the allegations of the complaint.”). Nevertheless, the Panel will still examine the record to determine if Respondent has rights or legitimate interests under Policy ¶4(c).

Nothing in the evidence, including the WHOIS information, suggests Respondent is commonly known by the <**truthaboutnutrition.com**> domain name. According to Complainant, Respondent is not authorized to use the THE TRUTH ABOUT NUTRITION mark. Therefore, the Panel finds Respondent is not commonly known by the <**truthaboutnutrition.com**> domain name pursuant to Policy ¶4(c)(ii). See *Charles Jourdan Holding AG v. AAIM*, 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); *Wells Fargo & Co. v. Onlyne Corp. Services11, Inc.*, FA 198969 (Nat. Arb. Forum Nov. 17, 2003) (“Given the WHOIS contact information for the disputed domain [name], one can infer that Respondent, Onlyne Corporate Services11, is not commonly known by the name ‘wellsfargo’ in any derivation.”).

According to the evidence, the disputed domain name resolves to a “test” website. The Panel concludes there is no *bona fide* offering of goods and services under Policy ¶4(c)(i) or legitimate noncommercial or fair use under Policy ¶4(c)(iii) where Respondent has failed to actively use a disputed domain name and where no evidence has been provided showing demonstrable preparations for use of the disputed domain name. See *America. Online, Inc. v. Kloszewski*, FA 204148 (Nat. Arb. Forum Dec. 4, 2003) (“Respondent’s passive holding of the <aolfact.com> domain name for over six months is evidence that Respondent lacks rights and legitimate interests in the domain name.”); see also *Bloomberg L.P. v. Sandhu*, FA 96261 (Nat. Arb. Forum Feb. 12, 2001) (finding that no rights or legitimate interests can be found when the respondent fails to use disputed domain names in any way).

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

Registration and Use in Bad Faith

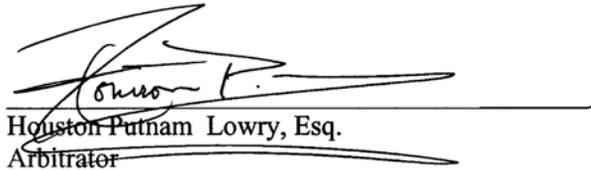
Respondent's registration and failure to make active use of the <truthaboutnutrition.com> domain name along with a failure to provide evidence showing preparations to use the disputed domain name indicates bad faith registration and use under Policy ¶4(a)(iii). See *Caravan Club v. Mrgsale*, FA 95314 (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 passive holding of a domain name permits an inference of registration and use in bad faith); see also *Mondich v. Brown*, D2000-0004 (WIPO Feb. 16, 2000) (holding that the respondent's failure to develop its website in a two-year period raises the inference of registration in bad faith).

The Panel concludes Complainant 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 <truthaboutnutrition.com> domain name be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: October 3, 2007

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