



NATIONAL ARBITRATION FORUM

DECISION

Zoller IP Holdings, LLC v. Domain Explorer
Claim Number: FA0603000670052

PARTIES

Complainant is **Zoller IP Holdings, LLC** ("Complainant"), represented by **Joel B. Rothman**, of **Rutherford Mulhall, P.A.**, 2600 North Military Trail, Fourth Floor, Boca Raton, FL 33431-6348. Respondent is **Domain Explorer** ("Respondent"), 9859 NW 4 TER, Miami, FL 33172.

REGISTRAR AND DISPUTED DOMAIN NAMES

The domain names at issue are <**wwwzantrex.com**> and <**wwwzantrex3.com**>, registered with **Enom, 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 March 29, 2006; the National Arbitration Forum received a hard copy of the Complaint on March 30, 2006.

On March 30, 2006, Enom, Inc. confirmed by e-mail to the National Arbitration Forum that the <**wwwzantrex.com**> and <**wwwzantrex3.com**> domain names are registered with Enom, Inc. and that Respondent is the current registrant of the names. Enom, Inc. has verified that Respondent is bound by the Enom, 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 April 3, 2006, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of April 24, 2006 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@wwwzantrex.com and postmaster@wwwzantrex3.com by e-mail.

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

On April 28, 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 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 names be transferred from Respondent to Complainant.

PARTIES' CONTENTIONS

A. Complainant makes the following assertions:

1. Respondent's <**wwwzantrex.com**> and <**wwwzantrex3.com**> domain names are confusingly similar to Complainant's ZANTREX-3 mark.
2. Respondent does not have any rights or legitimate interests in the <**wwwzantrex.com**> and <**wwwzantrex3.com**> domain names.
3. Respondent registered and used the <**wwwzantrex.com**> and <**wwwzantrex3.com**> domain names in bad faith.

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

FINDINGS

Complainant, Zoller IP Holdings, LLC, holds a trademark registration with the United States Patent and Trademark Office ("USPTO") for the ZANTREX-3 mark (Reg. No. 2,959,351 issued June 7, 2005; filed January 13, 2003), in connection with the manufacturing, distribution and sales of dietary supplements. Complainant has common law rights to the ZANTREX mark which arose at the same time.

Respondent registered the <**wwwzantrex.com**> and <**wwwzantrex3.com**> domain names on February 25, 2003. Respondent is using the disputed domain names to redirect Internet users to its commercial website that features Complainant's mark and promotes Complainant's product without Complainant's authorization.

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

Complainant established it has rights in the ZANTREX-3 mark through registration of the mark with the USPTO. *See Am. Online, Inc. v. Thomas P. Culver Enters.*, D2001-0564 (WIPO June 18, 2001) (finding that successful trademark registration with the USPTO creates a presumption of rights in a mark); *see also Innomed Tech., 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."). Although Complainant's mark was registered after Respondent's registration of the disputed domain names, Complainant's filing date for the mark predates the domain name registrations. *See Planetary Soc'y v. Rosillo*, D2001-1228 (WIPO Feb. 12, 2002) (holding that the effective date of Complainant's trademark rights dates back to the application's filing date). Complainant also has common-law rights to the ZANTREX mark, which arise at the same time as the trademark application was filed.

The disputed domain names Respondent registered, <wwwzantrex.com> and <wwwzantrex3.com>, are confusingly similar to Complainant's distinctive ZANTREX-3 registered mark and Complainant's common-law mark because Respondent's domain names incorporate the dominant features of Complainant's mark, add the letters "www" and the generic top-level domain ".com," and the <wwwzantrex.com> domain name

omits the hyphen and number “3.” The Panel finds such minor alterations to Complainant’s registered mark do not sufficiently differentiate the confusingly similar aspects of Respondent’s domain names pursuant to Policy ¶4(a)(i). *See Bank of Am. Corp. v. InterMos*, FA 95092 (Nat. Arb. Forum Aug. 1, 2000) (finding that the respondent’s domain name <wwwbankofamerica.com> is confusingly similar to the complainant’s registered trademark BANK OF AMERICA because it “takes advantage of a typing error (eliminating the period between the www and the domain name) that users commonly make when searching on the Internet”); *see also Gardline Surveys Ltd. v. Domain Fin. Ltd.*, FA 153545 (Nat. Arb. Forum May 27, 2003) (“The addition of a top-level domain is irrelevant when establishing whether or not a mark is identical or confusingly similar, because top-level domains are a required element of every domain name.”); *see also Nat’l Cable Satellite Corp. v. Black Sun Surf Co.*, FA 94738 (Nat. Arb. Forum June 19, 2000) (holding that the domain name <cspan.net>, which omitted the hyphen from the trademark spelling, C-SPAN, is confusingly similar to the complainant’s mark).

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

Rights or Legitimate Interests

Complainant alleged Respondent does not have rights to or legitimate interests in the <wwwzantrex.com> and <wwwzantrex3.com> domain names. Once Complainant makes a *prima facie* case in support of its allegations, the burden shifts to Respondent to prove that it does have rights or legitimate interests pursuant to Policy ¶4(a)(ii). *See G.D. Searle v. Martin Mktg.*, FA 118277 (Nat. Arb. Forum Oct. 1, 2002) (holding that, where the complainant has asserted that respondent does not have rights or legitimate interests with respect to the domain name, it is incumbent on respondent to come forward with concrete evidence rebutting this assertion because this information is “uniquely within the knowledge and control of the respondent”); *see also Clerical Med. Inv. Group Ltd. v. Clericalmedical.com*, D2000-1228 (WIPO Nov. 28, 2000) (finding that, under certain circumstances, the mere assertion by the complainant that the respondent does not have rights or legitimate interests is sufficient to shift the burden of proof to the respondent to demonstrate that such a right or legitimate interest does exist).

Respondent is using the <wwwzantrex.com> and <wwwzantrex3.com> domain names to redirect Internet users to its commercial website that features Complainant’s marks and promotes Complainant’s product without Complainant’s authorization. Respondent’s use of domain names that are confusingly similar to Complainant’s ZANTREX-3 registered mark and ZANTREX common-law mark to redirect Internet users interested in Complainant’s products and services to a website that promotes Complainant’s products and services without Complainant’s authorization is not a use in connection with a *bona fide* offering of goods or services pursuant to Policy ¶4(c)(i), or a legitimate noncommercial or fair use of the domain name pursuant to Policy ¶4(c)(iii). *See G.D. Searle & Co. v. Mahony*, FA 112559 (Nat. Arb. Forum June 12, 2002) (finding the respondent’s use of the disputed domain name to solicit pharmaceutical orders without a

license or authorization from the complainant does not constitute a *bona fide* offering of goods or services under Policy ¶4(c)(i); *see also Chanel, Inc. v. Cologne Zone*, D2000-1809 (WIPO Feb. 22, 2001) (finding that use of the complainant's mark to sell the complainant's perfume, as well as other brands of perfume, is not *bona fide* use); *see also Nat'l Collegiate Athletic Ass'n v. Halpern*, D2000-0700 (WIPO Dec. 10, 2000) (finding that domain names used to sell the complainant's goods without the complainant's authority, as well as others' goods, is not *bona fide* use).

Respondent offered no evidence and no evidence in the record suggests Respondent is commonly known by the <wwwzantrex.com> or <wwwzantrex3.com> domain name. Respondent has not established rights or legitimate interests in the <wwwzantrex.com> and <wwwzantrex3.com> domain names pursuant to Policy ¶4(c)(ii). *See Compagnie de Saint Gobain v. Com-Union Corp.*, D2000-0020 (WIPO Mar. 14, 2000) (finding no rights or legitimate interests 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); *see also 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 Broadcom Corp. v. Intellifone Corp.*, FA 96356 (Nat. Arb. Forum Feb. 5, 2001) (finding no rights or legitimate interests because respondent was not commonly known by the disputed domain name and was not using the domain name in connection with a legitimate or fair use).

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

Registration and Use in Bad Faith

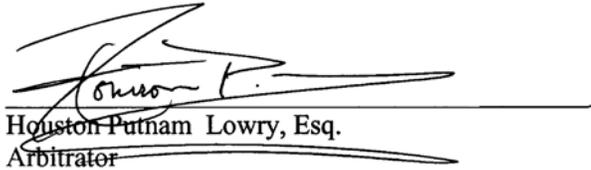
Complainant also alleged Respondent acted in bad faith by registering and using domain names containing variations of Complainant's mark without Complainant's authorization. The <wwwzantrex.com> and <wwwzantrex3.com> domain names resolve to Respondent's commercial website that promotes Complainant's products and services without Complainant's authorization. Additionally, Respondent's use of the dominant features of Complainant's ZANTREX-3 registered mark and the ZANTREX common-law mark in the domain names creates a likelihood of confusion and suggests an attempt to attract Internet users to Respondent's website for Respondent's commercial gain. The Panel finds this is 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 G.D. Searle & Co. v. Celebes Drugstore*, FA 123933 (Nat. Arb. Forum Nov. 21, 2002) (finding that the respondent registered and used the domain name in bad faith pursuant to Policy ¶4(b)(iv) because the respondent was using the confusingly similar domain name to attract Internet users to its commercial website).

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 <wwwzantrex.com> and <wwwzantrex3.com> domain names be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: May 12, 2006

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