



## DECISION

Real Food for Real Kids Inc. v. Boaden Catering Ltd.

Claim Number: FA1503001610981

### PARTIES

Complainant is **Real Food for Real Kids Inc.** (“Complainant”), represented by **Zak Muscovitch** of **The Muscovitch Law Firm**, Canada. Respondent is **Boaden Catering Ltd.** (“Respondent”), represented by **Douglas H. Hancock**, Ontario, Canada.

### REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is **<realfoodforrealkidss.com>**, registered with **NETWORK SOLUTIONS, LLC.**

### PANEL

The undersigned certifies that she acted independently and impartially and that to the best of her knowledge, she has no known conflict in serving as Panelist in this proceeding. Hon. Carolyn Marks Johnson sits as Panelist.

### PROCEDURAL HISTORY

Complainant submitted a Complaint to the FORUM electronically March 24, 2015; the FORUM received payment March 24, 2015.

On March 24, 2015, NETWORK SOLUTIONS, LLC. confirmed by e-mail to the FORUM that the **<realfoodforrealkidss.com>** domain name is registered with NETWORK SOLUTIONS, LLC. and that Respondent is the current registrant of the name. NETWORK SOLUTIONS, LLC. verified that Respondent is bound by

the NETWORK SOLUTIONS, LLC. registration agreement and thereby agreed to resolve domain disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On March 25, 2015, the FORUM served the Complaint and all Annexes, including a Written Notice of the Complaint, setting a deadline of April 14, 2015, by which Respondent could file a Response to the Complaint, via e-mail to all entities and persons listed on Respondent's registration as technical, administrative, and billing contacts, and to postmaster@realfoodforrealkidss.com. Also on March 25, 2015, the Written Notice of the Complaint, notifying Respondent of the e-mail addresses served and the deadline for a Response was transmitted to Respondent via post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts.

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

On April 21, 2015, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the FORUM appointed Hon. Carolyn Marks Johnson to sit as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that the FORUM 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" through submission of Electronic and Written Notices, as defined in Rule 1 and Rule 2. Therefore, the Panel may issue its decision based on the documents submitted and in accordance with the ICANN Policy, ICANN Rules, the 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's Contention in this proceeding:

- a. Policy ¶ 4(a)(i): Confusingly Similar Domain Name
  - i. Complainant uses the REAL FOOD FOR REAL KIDS mark in connection with its children's catering business.
  - ii. Complainant registered the REAL FOOD FOR REAL KIDS mark with the Canadian Intellectual Property Office ("CIPO") (*e.g.*, Reg. No. TMA669508, registered August 9, 2006), which evidences rights in the mark.
  - iii. Respondent's <realfoodforrealkidss.com> domain name is confusingly similar because it incorporates the REAL FOOD FOR REAL KIDS mark in its entirety and adds the extra letter "s" and the ".com" generic top-level domain ("gTLD"), and eliminates spacing between words.
  
- b. Policy ¶ 4(a)(ii): Rights or Legitimate Interests In Domain Name
  - i. Policy ¶ 4(c)(ii): Commonly Known By
    - 1. Respondent is not commonly known by the disputed domain name.
    - 2. Complainant has not given Respondent authorization to register the <realfoodforrealkidss.com> domain name or any variant of the REAL FOOD FOR REAL KIDS mark.

- ii. Policy ¶ 4(c)(i) and ¶ 4(c)(iii): *Bona Fide* Offering of Goods or Services; Legitimate Noncommercial or Fair Use
  - 1. Respondent is not making a *bona fide* offering of goods or services or a legitimate noncommercial or fair use.
    - a. Rather, Respondent's <realfoodforrealkidss.com> domain name resolves to a pay-per-click holding page, which contains random links related to the REAL FOOD FOR REAL KIDS mark.
- c. Policy ¶ 4(a)(iii): Bad Faith
  - i. Policy ¶ 4(b)(i): Offer for Sale
    - 1. Respondent's letter at Annex P demanded the sum of \$42,000.00 in exchange for the transfer of the disputed domain name.
  - ii. Policy ¶ 4(b)(iv): Attraction for Commercial Gain
    - 1. Respondent is likely gaining click-through fees from Internet users who come across the disputed domain name looking for Complainant's website, thereby profiting from the goodwill associated with Complainant's REAL FOOD FOR REAL KIDS mark.

B. Respondent's Contentions:

- a. Respondent did not submit a response in this proceeding, however Complainant did receive an email from counsel for Respondent that stated that Respondent would not be defending itself against the Complainant.
- b. The Panel notes that Respondent registered the <realfoodforrealkidss.com> domain name July 12, 2014.

## FINDINGS

Complainant established that it has legal rights to and legitimate interests in the disputed domain name containing in its entirety Complainant's protected mark.

Respondent registered a domain name containing Complainant's protected mark and the disputed domain name is confusingly similar to Complainant's mark

Respondent has no rights to or legitimate interests in the disputed domain name containing Complainant's protected mark.

Respondent registered and used the disputed domain name in bad faith.

## **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 Complainant to 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.

Given 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 will draw such inferences as the Panel 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.").

### Identical or Confusingly Similar:

Complainant uses the REAL FOOD FOR REAL KIDS mark in connection with its children's catering business. Complainant registered the REAL FOOD FOR REAL KIDS mark with the CIPO (*e.g.*, Reg. No. TMA669508, registered August 9, 2006), and such registration is sufficient to support findings of rights in the mark, pursuant to Policy ¶ 4(a)(i). *See Cactus Rests. Ltd. v. Web Master*, FA 671297 (Nat. Arb. Forum May 23, 2006) ("The Panel should not "second guess" the Patent Offices of Canada and the USA to say that Cactus Club should not have been registered as a trademark."). Therefore, this Panel agrees that Complainant established legal rights in the mark pursuant to Policy ¶ 4(a)(i).

Next, Complainant contends that Respondent's <realfoodforrealkidss.com> domain name is confusingly similar because it incorporates the REAL FOOD FOR REAL KIDS mark in its entirety, adds an extra letter "s" to kids and the ".com" gTLD, and eliminates spacing between words. Panels have seen the added "s", the ".com" gTLD, and the elimination of spacing as insufficient to overcome a finding of confusing similarity. *See T.R. World Gym-IP, LLC v. D'Addio*, FA 956501 (Nat. Arb. Forum May 22, 2007) (finding that addition of the letter "s" to a registered trademark in a contested domain name is not enough to avoid a finding of confusing similarity under Policy ¶ 4(a)(i)); *see also Bond & Co. Jewelers, Inc. v. Tex. Int'l Prop. Assocs.*, FA 937650 (Nat. Arb. Forum Apr. 30,

2007) (finding that the elimination of spaces between terms and the addition of a gTLD do not establish distinctiveness from the complainant's mark under Policy ¶ 4(a)(i)). Therefore, this Panel agrees that Respondent's <realfoodforrealkidss.com> domain name is confusingly similar to the REAL FOOD FOR REAL KIDS mark under Policy ¶ 4(a)(i).

Respondent makes no contentions relative to Policy ¶ 4(a)(i).

The Panel finds that Respondent registered a domain name that is confusingly similar to Complainant's protected mark; Complainant satisfied the elements of ICANN Policy ¶ 4(a)(i).

**Rights or Legitimate Interests:**

Complainant must first make a *prima facie* case that Respondent lacks rights and legitimate interests in the disputed domain name under Policy ¶ 4(a)(ii), and then the burden of proof shifts to Respondent to show it does have such rights or legitimate interests. *See Hanna-Barbera Prods., Inc. v. Entm't Commentaries*, FA 741828 (Nat. Arb. Forum Aug. 18, 2006) (holding that the complainant must first make a *prima facie* case that the respondent lacks rights and legitimate interests in the disputed domain name under UDRP ¶ 4(a)(ii) before the burden shifts to the respondent to show that it does have rights or legitimate interests in a domain name); *see also AOL LLC v. Gerberg*, FA 780200 (Nat. Arb. Forum Sept. 25, 2006) ("Complainant must first make a *prima facie* showing that Respondent does not have rights or legitimate interest in the subject domain names, which burden is light. If Complainant satisfies its burden, then the burden shifts to Respondent to show that it does have rights or legitimate interests in the subject domain names.").

Complainant argues that Respondent has no rights or legitimate interests in the <realfoodforrealkidss.com> domain name. Complainant contends that Respondent is not commonly known by the disputed domain name, and Complainant notes that it has not given Respondent authorization to register the <realfoodforrealkidss.com> domain name or make any use of the REAL FOOD FOR REAL KIDS mark. The Panel notes that the relevant WHOIS information states that the registrant of record is “Boaden Catering Ltd.” See Compl., at Attached Annex B. Further, the Panel notes that Respondent did not submit a response in this proceeding. Given Respondent’s failure to offer evidence for the Panel’s consideration, the Panel finds no basis to support a finding that Respondent is commonly known by the <realfoodforrealkidss.com> domain name per Policy ¶ 4(c)(ii). See *Reese v. Morgan*, FA 917029 (Nat. Arb. Forum Apr. 5, 2007) (concluding that the respondent was not commonly known by the <lilpunk.com> domain name as no evidence in the record showed that respondent was commonly known by that domain name, including the WHOIS information and the complainant’s assertion that it did not authorize or license the respondent’s use of its mark in a domain name).

Complainant contends next that Respondent is not making a *bona fide* offering of goods or services or a legitimate noncommercial or fair use. Rather, Respondent’s <realfoodforrealkidss.com> domain name resolves to a pay-per-click holding page, which contains random links related to the REAL FOOD FOR REAL KIDS mark. See Compl., at Attached Annex Q. Where a respondent’s disputed domain name resolves to a page displaying pay-per-click links, such use constitutes neither a *bona fide* offering of goods or services, nor a legitimate noncommercial or fair use. See *Black & Decker Corp. v. Clinical Evaluations*, FA 112629 (Nat. Arb. Forum June 24, 2002) (holding that the respondent’s use of the disputed domain name to redirect Internet users to commercial websites, unrelated to the complainant and presumably with the purpose of earning a commission or pay-per-click referral fee did not evidence rights or legitimate

interests in the domain name). Therefore, the Panel agrees that Respondent's use of the disputed domain name to attract Internet users for commercial gain constitutes neither a *bona fide* offering of goods or services under Policy ¶ 4(c)(i), nor a legitimate noncommercial or fair use under Policy ¶ 4(c)(iii).

Respondent makes no contentions relative to Policy ¶ 4(a)(ii).

The Panel finds that Respondent has no rights to or legitimate interests in the disputed domain name; Complainant satisfied the elements of ICANN Policy ¶ 4(a)(ii).

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

Complainant's Annex P contained copies of correspondence with Respondent that shows that Respondent demanded from Complainant the sum of \$42,000.00 in exchange for the transfer of the disputed domain name. *See* Compl., at Attached Annex P. The Panel agrees that Respondent's offer to sell the disputed domain name for an amount that on its face seems far in excess of expected and reasonable out-of-pocket costs is evidence that supports findings of bad faith pursuant to Policy ¶ 4(b)(i). *See Am. Online, Inc. v. Prijic*, FA 112639 (Nat. Arb. Forum June 27, 2002) (“[I]n determining whether Respondent has sought consideration in excess of its out-of-pocket costs, the Policy makes clear that only costs related to the domain name are to be considered, and not those related to the creation or maintenance of the connected website”).

Finally, Complainant argues that Respondent is likely gaining click-through fees from Internet users who come across the disputed domain name looking for Complainant's website, thereby profiting from the goodwill associated with Complainant's REAL FOOD FOR REAL KIDS mark. *See* Compl., at Attached Ex. Q. Such links include “Real Food”, “Real Football 2013”, “Game for Kid” and

“Kid Soccer.” *Id.* The Panel agrees that Respondent’s use of the disputed domain name constitutes attraction for commercial gain pursuant to Policy ¶ 4(b)(iv). *See T-Mobile USA, Inc. v. utahhealth*, FA 697821 (Nat. Arb. Forum June 7, 2006) (holding that the registration and use of a domain name confusingly similar to a complainant’s mark to direct Internet traffic to a commercial “links page” in order to profit from click-through fees or other revenue sources constitutes bad faith under Policy ¶ 4(b)(iv)).

Further, the Panel notes that the wording of the domain name itself, Respondent’s use of the domain name, Respondent’s contact with Complainant relative to the proposed offer to sell, and Respondent’s offer to sell the domain name for an on its face outrageous price all permit the Panel to make an appropriate inference and find that at the time this domain name was registered, Respondent had actual knowledge of Complainant’s rights in its protected mark and registered and used this domain name in bad faith.

Respondent makes no contentions relative to Policy ¶ 4(a)(iii).

The Panel finds that Respondent registered and used the disputed domain name in bad faith; Complainant satisfied the elements of ICANN 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 <**realfoodforrealkidss.com**> domain name be TRANSFERRED from Respondent to Complainant.

  
HONORABLE CAROLYN MARKS JOHNSON  
RETIRED JUDGE  
ARBITRATOR

Hon. Carolyn Marks Johnson, Panelist

Dated: May 5, 2015