



DECISION

The Toronto-Dominion Bank v. 周海强

Claim Number: FA1801001769720

PARTIES

Complainant is **The Toronto-Dominion Bank** (“Complainant”), represented by **CSC Digital Brand Services AB**, Sweden. Respondent is **周海强** (“Respondent”), China.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is **<tdbank.vip>**, registered with **Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn)**.

PANEL

The undersigned certifies that he has acted independently and impartially and to the best of his knowledge has no known conflict in serving as Panelist in this proceeding.

David L. Kreider, as Panelist.

PROCEDURAL HISTORY

Complainant submitted a Complaint to the FORUM electronically on January 30, 2018; the FORUM received payment on January 30, 2018.

On January 31, 2018, Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn) confirmed by e-mail to the FORUM that the **<tdbank.vip>** domain name is registered with Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn) and that Respondent is the current registrant of the name. Alibaba Cloud Computing

Ltd. d/b/a HiChina (www.net.cn) has verified that Respondent is bound by the Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn) registration agreement and has thereby agreed to resolve domain disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On February 8, 2018, the FORUM served the Complaint and all Annexes, including a Written Notice of the Complaint, setting a deadline of February 28, 2018 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@tdbank.vip. Also, on February 8, 2018, 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 March 5, 2018, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the FORUM appointed David L. Kreider as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that the 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" 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.

LANGUAGE OF PROCEEDINGS

Complainant requests that these administrative proceedings be conducted in English, for the following reasons:

1. Complainant is unable to communicate in Chinese and translation of the Complaint would unfairly disadvantage and burden the Complainant and delay the proceedings and adjudication of this matter;
2. The Disputed Domain Name is comprised of Latin characters;
3. The terms TD BANK, which comprise the Disputed Domain Name, do not carry any specific meaning in the Chinese language;
4. Complainant previously sent cease-and-desist letters to Respondent, as provided in the Complaint, and Respondent replied to these letters without difficulty. *Although Respondent wrote back in Chinese, his response clearly showed that he understood Complainant's communication in English and has not given any indication that he lacks understanding of the English language.* Respondent also had ample time and opportunity to request that communications continue in Chinese, but he never raised or issued such a request. To allow Respondent to dictate the course of this matter and further burden Complainant at this juncture would contravene the spirit of the UDRP and disadvantage Complainant; and

5. Pursuant to Paragraph 11(a) of the Rules, the Panel may determine the language of the proceedings having regard to all circumstances, and to help ensure fairness, and maintain an inexpensive and expeditious avenue for resolving domain disputes. Here, in light of the Respondent's use of the Disputed Domain Name and Respondent's decision to register a domain name that misappropriates the famous TD and TD BANK marks and brands, it would unduly burden Complainant to have to arrange and pay for translation where Respondent has demonstrated behavior that disrupts Complainant's business and has already required Complainant to devote significant time and resources to addressing this instance of abuse. Even in instances where a registration agreement was in a language other than English, past Panels have made the decision to allow a case to proceed in English based on the totality of circumstances in that case. *See Immobilière Dassault SA, Groupe Industriel Marcel Dassault v. DuanZuoChun*, D2011-2106 (WIPO February 21, 2012). *See also Dama S.p.A. v. Duan Zuochun*, D2012-1015 (WIPO July 5, 2012).

(Emphasis added).

In fact, Respondent did represent in a February 19, 2018, email to FORUM, that he is unable to apprehend English. (Complainant was not copied in on the email and had no way of knowing this). In reply to an English-language email sent to him by FORUM, Respondent politely inquired in Chinese:

“对不起，我看不懂你们的内容，能否发一下中文呢？”，or, “Pardon me, I am unable to read this, can you send it in Chinese?”¹

¹ Respondent's Chinese-language email as translated into English by the Panel. The Panel speaks fluently and reads Chinese as a second language, in addition to his native English.

Thus, *prima facie*, Respondent has given an indication in these proceedings that he lacks understanding of the English language. The Panel finds, however, that, as urged by Complainant, Respondent's various Chinese-language replies to Complainant's cease-and-desist letters establish beyond any serious question that Respondent understood Complainant's English-language communications and has no difficulty reading and apprehending English. Respondent's assertion that he does not understand English, as set forth in his email to FORUM, is insincere, amounting to nothing more than a smokescreen, as is clearly evident from Respondent's email replies to Complainant's emails.

In one of his reply emails to Complainant, Respondent purports to raise numerous arguments why Respondent's <tdbank.vip> domain does not infringe Complainant's registered TD and TD BANK trademarks under Chinese law. Respondent concludes by asserting:

“ ... 那希望你们认真学习中国法律，再来起诉我” , or, “ I hope you will diligently study Chinese law, and then come to sue me” .

The tone of Respondent's emails to Complainant becomes increasingly hostile over time, after it became apparent that Complainant did not wish to agree to “cover Respondent's losses” and “make an offer to purchase the disputed domain name” from Respondent, at the latter's request. Respondent's closing email to Complainant reads:

“欢迎你起诉我！你不起诉我，我都瞧不起你，光说不练的唠叨家伙。五日内你不起诉我，我会鄙视你，瞧不起你的！”， or, “I welcome your lawsuit against me! If you do not sue me, I will look down on you as being all talk and no action. If you don't sue me within 5 days, I will look at you with disgust and despise you!”

Finally, it must be noted that FORUM sent timely a notice of these UDRP proceedings to Respondent written in Chinese and that, his receipt of notice notwithstanding, Respondent has defaulted in these proceedings and failed to submit a Response.

Pursuant to UDRP Rule 11(a), the Panel finds that persuasive evidence has been adduced by Complainant to suggest the likely possibility that the Respondent is conversant and proficient in the English language. After considering the circumstance of the present case, the Panel decides that the proceeding should be in English.

RELIEF SOUGHT

Complainant requests that the domain name be transferred from Respondent to Complainant.

PARTIES' CONTENTIONS

A. Complainant

1. The Disputed Domain Name is Identical or Confusingly Similar to a Trademark or Service Mark in which the Complainant has Rights.

By virtue of its trademark registrations, Complainant is the owner of Complainant's trademarks. *See United Way of America v. Alex Zingaus*, FA 1036202 (NAF Aug. 30, 2007) ("Panels have long recognized Complainant's registration of a mark with a trademark authority is sufficient to confer rights in the mark pursuant to Policy ¶ 4(a)(i)").

When comparing the Disputed Domain Name to Complainant's trademarks, the relevant comparison to be made is between only the second-level portion of the Disputed Domain Name and the Complainant's trademarks. *See Kabushiki Kaisha Toshiba d/b/a Toshiba Corporation v. Guo MengNi / GuoMengNi Guo /*

Guo GuoMengNi / 郭孟妮, FA 1747411 (NAF Oct. 3, 2017) (finding that the top-level domain, such as “.net”, “.com”, “.org” or “.vip”, does not affect the domain name for the purpose of determining whether it is identical or confusingly similar).

The Disputed Domain Name contains Complainant’s TD and TD BANK trademarks in their entirety, thus resulting in a domain name that is identical to the Complainant’s TD and TD BANK trademarks. Where, as here, a disputed domain name encompasses and captures a complainant’s trademark in its entirety, past Panels have established that the disputed domain name should be found confusingly similar to that trademark. Thus, the Disputed Domain Name should be considered identical and confusingly similar to the Complainant’s TD and TD BANK trademarks. *See Altria Group, Inc. and Altria Group Distribution Company v. yu fan / fanyu*, FA 1683563 (NAF Aug. 18, 2016) (“The disputed domain name corresponds to Complainant’s ALTRIA mark, adding only the “.vip” top-level domain, making it identical to Complainant’s mark for purposes of paragraph 4(a)(i) of the Policy.”)

2. The Respondent has no Rights or Legitimate Interests in Respect of the Disputed Domain Name.

The granting of registrations by the State Administration for Industry & Commerce of the People's Republic of China (SAIC), Canadian Intellectual Property Office (CIPO) and the U.S. Patent and Trademark Office (USPTO) to Complainant for the TD and TD BANK trademarks is *prima facie* evidence of the validity of the terms “td ” and “td bank” as trademarks, of Complainant’s ownership of these trademarks, and of Complainant’s exclusive right to use the and TD and TD BANK trademarks in commerce on or in connection with Complainant’s goods and/or services. Respondent is not commonly known by the Disputed Domain Name, which evinces a lack of rights or legitimate interests.

Respondent is not sponsored by or affiliated with Complainant in any way. Complainant has not given Respondent permission to use Complainant's trademarks in any manner, including in domain names. Where "the Whois information suggests that Respondent is known as an entity other than the trademark associated with Complainant, and Complainant has not licensed, authorized, or permitted Respondent to register domain names incorporating Complainant's...mark," a Panel should find that the Respondent is not commonly known by the Disputed Domain Name. *See United Way of America v. Alex Zingaus*, FA 1036202 (NAF Aug. 30, 2007).

In the instant case, the pertinent Whois information identifies the Registrant as "周海强," which does not resemble the Disputed Domain Name in any manner – thus, where no evidence, including the Whois record for the Disputed Domain Name, suggests that Respondent is commonly known by the Disputed Domain Name, then Respondent cannot be regarded as having acquired rights to or legitimate interests in the Disputed Domain Name within the meaning of ¶ 4(c)(ii). *See Instron Corp. v. Kaner*, FA 0768859 (NAF Sept. 21, 2006) (finding that the respondent was not commonly known by the disputed domain names because the Whois information listed "Andrew Kaner c/o Electromatic a/k/a Electromatic Equip't" as the registrant and there was no other evidence in the record to suggest that the respondent was commonly known by the domain names in dispute).

Despite Respondent's claim that it plans to use the Disputed Domain Name for a website which introduces finance management and stock investment information to Chinese users, no indication or evidence of such plans has been presented. Respondent is still using the Disputed Domain Name to redirect internet users to a website that resolves to a blank page and lacks content. Respondent has failed to make use of this Disputed Domain Name's website and has not demonstrated any attempt to make legitimate use of the domain name and

website, which evinces a lack of rights or legitimate interests in the Disputed Domain Name, as confirmed by numerous past Panels. *See Nenê f/k/a Maybyner Rodney Hilario v. Master, Host*, FA 0924563 (NAF Apr. 10, 2007) (Holding that absence of content at website evinced a lack of rights or legitimate interests in the disputed domain name). *See also Bloomberg L.P. v. SC Media Servs. & Info. SRL*, FA 0296583 (NAF Sept. 2, 2004) (Respondent is using the Disputed Domain Name to resolve to an empty page featuring no substantive content or links is further evidence that Respondent's failure to actively use the Disputed Domain Name(s) suggests a lack of rights and legitimate interests in the Disputed Domain Name(s) as blank pages are 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 registered the Disputed Domain Name on May 17, 2016, which is significantly after Complainant filed for registration of its relevant trademarks with SAIC, CIPO and the USPTO, and also significantly after Complainant's first use in commerce of the TD trademark in 1969.

Respondent registered the Disputed Domain Name on May 17, 2016, which is significantly after the Complainant's registration of its TD.COM on April 15, 1998 and TDBANK.COM on April 14, 1995.

3. The Disputed Domain Name was Registered and is Being Used in Bad Faith.

The Complainant and its TD and TD BANK trademarks are known internationally. The Complainant has marketed and sold its goods and services using this trademark since 1969, which is well before Respondent's registration of the Disputed Domain Name on May 17, 2016.

At the time of registration of the Disputed Domain Name, the Respondent knew, or at least should have known, of the existence of the Complainant's trademarks and that registration of domain names containing well-known trademarks constitutes bad faith *per se*. In addition to the numerous trademarks filed in connection with Complainant's business prior to Respondent's registration of the Disputed Domain Name, Complainant is the second largest bank in Canada by market capitalization and deposits, and the sixth largest bank in North America. Complainant has over 86,000 employees and over 25 million clients worldwide, which demonstrates Complainant's fame. Performing searches across a number of internet search engines for "tdbank" returns multiple links referencing Complainant and its business. *See Caesar World, Inc. v. Forum LLC*, D2005-0517 (WIPO Aug. 1, 2005) ("given the Complainant's worldwide reputation and presence on the Internet, indicates that Respondent was or should have been aware of the marks prior to registering the disputed Domain Name"). *See also Victoria's Secret v. Hardin*, FA 096694 (NAF Mar. 31, 2001) (Finding that, in light of the notoriety of Complainants' famous marks, Respondent had actual or constructive knowledge of the BODY BY VICTORIA marks at the time she registered the disputed domain name and such knowledge constituted bad faith).

Further, while constructive notice may sometimes alone be regarded as insufficient to support a finding of bad faith, numerous past Panels have held that a respondent should be considered as possessing actual notice and knowledge of a complainant's marks, and thus having registered the domain in bad faith, where the complainant's mark is well-known and the circumstances support such a finding, as is the case here. *See GO Local NC Farms, LLC v. Paul Darcy*, FA 1426087 (NAF Mar. 13, 2012) ("a finding of bad faith hinges squarely on the probability that it was more likely than not that respondent knew of, and targeted, complainant's trade mark"). *See also Orbitz Worldwide, LLC v. Domain Librarian*, FA 1535826 (NAF Feb. 6, 2014) ("The Panel notes that although the UDRP does not recognize "constructive notice" as sufficient grounds for finding

Policy ¶ 4(a)(iii) bad faith, the Panel here finds actual knowledge through the name used for the domain and the use made of it"). *See also Clearwater Systems, Inc. v. Glenn Johnson / Clear Water Systems of Remington Inc.*, D2014-0878 (WIPO Aug. 5, 2014) ("Knowledge and targeting [of a trademark] may be proven inferentially").

As mentioned, the Disputed Domain Name still resolves to an inactive site and is not being used, though past Panels have noted that the word bad faith "use" in the context of ¶4(a)(iii) does not require a positive act on the part of the Respondent – instead, passively holding a domain name can constitute a factor in finding bad faith registration and use pursuant to Policy ¶ 4(a)(iii). *See Telstra Corp. v. Nuclear Marshmallows*, D2000-0003 (WIPO Feb. 18, 2000) ("it is possible, in certain circumstances, for inactivity by the Respondent to amount to the domain name being used in bad faith"). *See also Alitalia-Linee Aeree Italiane S.p.A v. Colour Digital*, D2000-1260 (WIPO Nov. 23, 2000) (finding bad faith where the Respondent made no use of the domain name in question and there are no other indications that the Respondent could have registered and used the domain name in question for any non-infringing purpose). *See also Twentieth Century Fox Film Corp. v. Risser*, FA 93761 (NAF May 18, 2000) ("The requirement in the ICANN Policy that a complainant prove that domain names are being used in bad faith does not require that it prove in every instance that a respondent is taking positive action. Use in bad faith can be inferred from the totality of the circumstances even when the registrant has done nothing more than register the names").

In this case, the Disputed Domain Name is confusingly similar to Complainant's trademarks, and Respondent has made no use of the Disputed Domain Name, factors which should be duly considered in assessing bad faith registration and use. *See DCI S.A. v. Link Commercial Corp.*, D2000-1232 (WIPO Dec. 7, 2000) (concluding that the respondent's passive holding of the domain name satisfies

the requirement of ¶4(a)(iii) of the Policy). *See also Clerical Med. Inv. Group Ltd. v. Clericalmedical.com*, D2000-1228 (WIPO Nov. 28, 2000) (finding that merely holding an infringing domain name without active use can constitute use in bad faith). *See also Caravan Club v. Mrgsale*, FA 95314 (NAF 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).

In addition to the Disputed Domain Name, the Respondent currently holds registrations for several other domain names that misappropriate the trademarks of well-known brands and businesses. This fact demonstrates that the Respondent is engaging in a pattern of cybersquatting/typosquatting, which is evidence of bad faith registration and use of the Disputed Domain Name. *See Armstrong Holdings, Inc. v. JAZ Assoc.*, FA 0095234 (NAF Aug. 17, 2000) (finding that the Respondent violated Policy ¶ 4(b)(ii) by registering multiple domain names that infringe upon others' famous and registered trademarks). *See also Time Warner Inc. v. Zone MP3*, FA 1008035 (NAF July 25, 2007) (Typosquatting combined with registration of as few as four domain names that are identical or confusingly similar to "protected marks" is sufficient to establish a pattern leading to bad faith). *See also Big Dog Holdings, Inc. v. Frank Day*, FA 0093554 (NAF March 9, 2000) (Finding that Respondent's registration of "at least fifty domain names, some of which were the registered trademarks of other entities" was evidence of bad faith).

The below represent further examples of cybersquatting/typosquatting by Respondent, thus establishing a pattern of such conduct and bad faith registration and use:

- <statefarm.mom> (State farm Mutual Automobile Insurance Company – STATE FARM)

- <telstra.vip> (Telstra Corporation Limited – TELSTRA)
- <vodafone.mom> (Vodafone Group PLC - VODAFONE)
- <zulily.vip> (Zulily LLC – ZULILY)

Complainant contacted the Respondent through cease and desist letters sent by emails. The Complainant advised the Respondent that the unauthorized use of the TD and TD BANK trademarks within the Disputed Domain Name violated the Complainant's rights in said trademark and requested voluntary transfer of the same. On January 9, 2018, Respondent replied and requested a payment. However, when Complainant refused to reimburse any costs for the transfer of the Disputed Domain Name, Respondent became uncooperative, disparaging and scornful. Since the efforts of trying to solve the matter amicably were unsuccessful, the Complainant chose to file a complaint according to the UDRP Process. *See Encyclopedia Britannica v. Zuccarini*, D2000-0330 (WIPO June 7, 2000) (failure to positively respond to a demand letter provides "strong support for a determination of 'bad faith' registration and use").

Finally, on balance of the facts set forth above, it is more likely than not that the Respondent knew of and targeted Complainant's trademark, and Respondent should be found to have registered and used the Disputed Domain Name in bad faith. *See Tudor Games, Inc. v. Domain Hostmaster, Customer ID No. 09382953107339 dba Whois Privacy Services Pty Ltd / Domain Administrator, Vertical Axis Inc.*, D2014-1754 (WIPO Jan 12, 2014) ("the Panel makes its finding regarding bad faith registration by asking whether it is more likely than not from the record of the evidence in the proceeding that Respondent had the ELECTRIC FOOTBALL trademark in mind when registering the Domain Name.")

B. Respondent

Respondent defaulted and failed to submit a Response in this proceeding.

FINDINGS

The Panel finds that Respondent's assertion in his email correspondence that "TD BANK" carries a distinctive meaning in the Chinese language wholly separate and apart from Complainant's trademark, and would be generally understood in China to mean "他的银行" [pronounced "TA DE YIN HANG" in Chinese], or "his bank", is utterly false and without basis in fact. Moreover, the Panel finds unpersuasive Respondent's assertion that he intended at some undisclosed future time to establish a website for the primary purpose of managing financial assets, and that Respondent had no idea that such activities might "coincidentally coincide" with Complainant's own use of its trademark.²

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.

² Respondent asserts in his email: "... tdbank 在中国这里是 "他的银行" 的意思, 目的是想建一个网站, 主要是理财用的, 凑巧的是没想到会与你们的商标重合" .

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(f), 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 (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 and/or Confusingly Similar

The Disputed Domain Name incorporates Complainant's TD and TD BANK trademarks in their entirety and is identical to the Complainant's TD and TD BANK trademarks. The addition of the gTLD ".VIP" is of no relevance to the inquiry and does not require a difference result.

Complainant has satisfied Paragraph 4(a)(i) of the Policy.

Rights or Legitimate Interests

The Panel finds no evidence, including the Whois record for the Disputed Domain Name, to suggest that Respondent is commonly known by the Disputed Domain Name, or that Respondent has acquired rights to or legitimate interests in the Disputed Domain Name. Respondent defaulted and has submitted no Response.

Complainant has satisfied Paragraph 4(a)(ii) of the Policy.

Registration and Use in Bad Faith

On balance, the Panel finds that Respondent opportunistically targeted Complainant's well-known trademarks and registered and is using the Disputed Domain Name in bad faith with a view to selling the Disputed Domain Name to Complainant. Complainant has, moreover, established that Respondent has engaged in a pattern of such bad faith registration and use of Internet domains incorporating the famous and well-known trademarks of others.

Complainant has satisfied Paragraph 4(a)(iii) of the Policy.

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 <tdbank.vip> domain name be **TRANSFERRED** from Respondent to Complainant.

David L. Kreider, Panelist

Dated: March 6, 2018