

ADMINISTRATIVE PANEL DECISION

**Nutricia International B.V. v. Domain Protection Services, Inc. / Enoch Okine,
Okine Tax & Bookkeeping, LLC
Case No. D2022-1776**

1. The Parties

The Complainant is Nutricia International B.V., Netherlands, represented by Dreyfus & associés, France.

The Respondent is Domain Protection Services, Inc., United States of America / Enoch Okine, Okine Tax & Bookkeeping, LLC, United States of America.

2. The Domain Name and Registrar

The disputed domain name <aptamileu.com> (the “Domain Name”) is registered with Name.com, Inc. (Name.com LLC) (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 17, 2022. On May 18, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On May 18, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name, which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to the Complainant on May 19, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on May 23, 2022.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on May 27, 2022. In accordance with the Rules, paragraph 5, the due date for Response was June 16, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on June 20, 2022.

The Center appointed Nicholas Smith as the sole panelist in this matter on June 30, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is a Dutch company, established in 1896, which specialises in the development and production of high-quality nutrition products including infant formula and cereals. The Complainant operates in over 100 countries. One of the Complainant's most well-known products is a range of infant formula which is sold under the trademark APTAMIL (the "APTAMIL Mark"). The Complainant has promoted its products under the APTAMIL Mark in various ways for over 20 years, including through the registration and use of the domain name <aptamil.com>.

The Complainant is the owner of numerous trademark registrations for the APTAMIL Mark, including a United States of America trademark registration registered on August 9, 2016, for goods in classes 5 and 29 (Registration Number 5,015,370).

The Domain Name was registered on April 26, 2021. The Domain Name resolves to a website (the "Respondent's Website") that reproduces the APTAMIL Mark and images of the Complainant's products. The Respondent's Website purports to offer a range of infant formula products including products from the Complainant and its competitors. The Respondent's Website does not contain any disclaimer that the Respondent is not associated with the Complainant, rather it states that the website is operated by "Aptamil EU".

5. Parties' Contentions

A. Complainant

The Complainant makes the following contentions:

- (i) that the Domain Name is identical or confusingly similar to the Complainant's APTAMIL Mark;
- (ii) that the Respondent has no rights nor any legitimate interests in respect of the Domain Name; and
- (iii) that the Domain Name has been registered and is being used in bad faith.

The Complainant is the owner of the APTAMIL Mark, having registered the APTAMIL Mark in numerous jurisdictions, including the United States of America and the European Union. The Domain Name reproduces the APTAMIL Mark along with the geographical abbreviation "EU" that does not distinguish the Domain Name from the APTAMIL Mark.

There are no rights or legitimate interests held by the Respondent in respect of the Domain Name. The Respondent is not commonly known as the Domain Name nor does the Respondent have any authorization from the Complainant to register the Domain Name. The Respondent is not making a legitimate noncommercial or fair use of the Domain Name. Rather the Respondent is using the Domain Name to create a website that diverts customers from the Complainant's official websites, such use not being *bona fide*.

The Domain Name was registered and is being used in bad faith. By using the Domain Name for a website that trades off the goodwill of the Complainant and its APTAMIL Mark, the Respondent is clearly aware of the APTAMIL Mark and is using it to deceive consumers as to its affiliation with the Complainant. Such conduct amounts to registration and use of the Domain Name in bad faith.

B. Respondent

The Respondent did not reply to the Complainant's contentions.

6. Discussion and Findings

A. Identical or Confusingly Similar

To prove this element the Complainant must have trademark or service mark rights and the Domain Name must be identical or confusingly similar to the Complainant's trademark or service mark.

The Complainant is the owner of the APTAMIL Mark, having registrations for APTAMIL as a trademark in the United States of America as well as in various other jurisdictions. The Domain Name incorporates the APTAMIL Mark with the addition of the geographic abbreviation "eu" (an abbreviation for European Union) and the generic Top-Level Domain ("gTLD") ".com", which can be discounted as an essential element of any domain name.

Previous UDRP panels have repeatedly held that the addition of other terms to a wholly incorporated trademark (whether descriptive, geographical, pejorative, meaningless, or otherwise) would not prevent a finding of confusing similarity under the first element; see section 1.8 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"). See also *The Bank of Nova Scotia v. Whois Protection*, WIPO Case No. [D2007-0884](#); and *Valero Energy Corporation, Valero Marketing and Supply Company v. Domain Name Proxy, LLC, Navigation Catalyst Systems, Inc.*, WIPO Case No. [D2011-1227](#).

The Panel finds that the Domain Name is confusingly similar to the Complainant's APTAMIL Mark. Consequently, the requirement of paragraph 4(a)(i) of the Policy is satisfied.

B. Rights or Legitimate Interests

In general, to succeed on this element, a complainant must make out a *prima facie* case that the respondent lacks rights or legitimate interests in the domain name. If such a *prima facie* case is made out, then the burden of production shifts to the respondent to demonstrate rights or legitimate interests in the domain name.

Paragraph 4(c) of the Policy enumerates several ways in which a respondent may demonstrate rights or legitimate interests in a domain name:

"Any of the following circumstances, in particular but without limitation, if found by the panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of paragraph 4(a)(ii):

(i) before any notice to you of the dispute, your 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; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are 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."

The Respondent is not affiliated with the Complainant in any way. It has not been authorized by the Complainant to register or use the Domain Name or to seek the registration of any domain name

incorporating the APTAMIL Mark or a mark similar to the APTAMIL Mark. There is no evidence that the Respondent is commonly known by the Domain Name or any similar name. There is no evidence that the Respondent has used or made demonstrable preparations to use the Domain Name in connection with a legitimate noncommercial use.

The Respondent has used the Domain Name to operate a website to sell infant formula. It is unclear on the evidence before the Panel whether the products sold from the Respondent's Website under the APTAMIL Mark are legitimate APTAMIL products. If the products sold on the Respondent's Website are not genuine products produced by the Complainant, the Respondent's use of the Domain Name does not grant it rights or legitimate interests since it is using the Complainant's APTAMIL Mark for a site selling counterfeit products (see [WIPO Overview 3.0](#), section 2.13.1).

Even if the Respondent is offering genuine APTAMIL products from the Respondent's Website, such use does not automatically grant it rights or legitimate interests. The principles that govern whether a reseller of genuine goods has rights or legitimate interests have been set out in a variety of UDRP decisions, starting with the case of *Okidata Americas, Inc. v. ASD, Inc.*, WIPO Case No. [D2001-0903](#).

The [WIPO Overview 3.0](#), section 2.8 summarizes the consensus views of UDRP panels in assessing claims of nominative (fair) use by resellers or distributors in the following manner:

"[...] Panels have recognized that resellers, distributors, or service providers using a domain name containing the complainant's trademark to undertake sales or repairs related to the complainant's goods or services may be making a *bona fide* offering of goods and services and thus have a legitimate interest in such domain name. Outlined in the "Okidata test", the following cumulative requirements will be applied in the specific conditions of a UDRP case:

- (i) the respondent must actually be offering the goods or services at issue;
 - (ii) the respondent must use the site to sell only the trademarked goods or services;
 - (iii) the site must accurately and prominently disclose the registrant's relationship with the trademark holder;
- and
- (iv) the respondent must not try to 'corner the market' in domain names that reflect the trademark.

The 'Okidata test' does not apply where any prior agreement, express or otherwise, between the parties expressly prohibits (or allows) the registration or use of domain names incorporating the complainant's trademark."

In this case, the Respondent's Website does not accurately or prominently disclose the Respondent's relationship with the Complainant, in particular that it is not an authorized dealer or has any particular connection with the Complainant. Furthermore, the Respondent is selling a variety of infant formula products from the Respondent's Website, including products from the Complainant's competitors. Even in the event that the Respondent is reselling genuine APTAMIL products from the Respondent's Website, its use of the Domain Name for the Respondent's Website does not grant it rights or legitimate interests in the Domain Name.

The Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the Domain Name. The Respondent has had the opportunity to put forward evidence of its rights or legitimate interests, including submissions as to why its conduct amounts to a right or legitimate interest in the Domain Name under the Policy. In the absence of such a response the Panel finds that the Respondent has no rights or legitimate interests in respect of the Domain Name under paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

For the purposes of paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that the respondent has registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of the complainant, for valuable consideration in excess of its documented out-of-pocket costs directly related to the domain name; or

(ii) the respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or

(iii) the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or location or of a product or service on the respondent's website or location (Policy, paragraph 4(b)).

The Panel finds that the Respondent was aware of the Complainant and its reputation in the APTAMIL Mark at the time the Domain Name was registered. The Respondent's Website contains numerous references to the Complainant, including purporting to offer the Complainant's products for sale and reproducing images of the Complainant's products. The registration of the Domain Name in awareness of the APTAMIL Mark and in the absence of rights or legitimate interests amounts under these circumstances to registration in bad faith.

The Respondent registered the Domain Name for the purposes of operating a website specifically to sell either the Complainant's products and/or third-party products that compete with the Complainant's products. The Respondent is using the Domain Name that is confusingly similar to the APTAMIL Mark to sell products, be they genuine or otherwise, in competition with the Complainant and without the Complainant's approval and without meeting the Oki Data test. Moreover, an individual viewing the Domain Name may be confused into thinking that the Domain Name refers to a website in some way connected to the Complainant.

Consequently, the Panel finds that the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant and the Complainant's APTAMIL Mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's Website.

Accordingly, the Panel finds that the Respondent has registered and used the Domain Name in bad faith under paragraph 4(a)(iii) of the Policy.

7. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name <aptamileu.com> be transferred to the Complainant.

/Nicholas Smith/

Nicholas Smith

Sole Panelist

Date: July 13, 2022