

## **ADMINISTRATIVE PANEL DECISION**

### **Maple Mountain Group, Inc. v. Kendra Roman, Roman Creative Case No. D2022-4112**

#### **1. The Parties**

The Complainant is Maple Mountain Group, Inc., United States of America (“United States”), represented by Barker Brettell Services Limited, United Kingdom.

The Respondent is Kendra Roman, Roman Creative, United States.

#### **2. The Domain Name and Registrar**

The disputed domain name <modereco.com> is registered with GoDaddy.com, LLC (the “Registrar”).

#### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 1, 2022. On November 2, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 3, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent (Registration Private, Domains By Proxy, LLC) and contact information in the Complaint. The Center sent an email communication to the Complainant on November 8, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant accordingly amended the Complaint on November 8, 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 November 15, 2022. In accordance with the Rules, paragraph 5, the due date for Response was December 5, 2022. The Respondent did not submit any Response. The Center notified the Parties of the Respondent’s default on December 8, 2022.

The Center appointed W. Scott Blackmer as the sole panelist in this matter on December 28, 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.

The Respondent sent an informal communication to the Center on December 28, 2022. The Center received a communication from Complainant on December 28, 2022, requesting the suspension of the administrative proceedings. The Panel issued on January 5, 2023, a Panel Order No. 1 suspending the proceeding until January 18, 2023, for purposes of settlement discussions concerning the disputed domain name. The Complainant requested an extension to the suspension of proceedings on January 17, 2023; the Panel issued a Panel Order No. 2 suspending the proceedings until February 1, 2023. The Complainant requested an extension to the suspension of proceedings on February 1, 2023; the Panel issued a Panel Order No. 3 suspending the proceedings until February 15, 2023.

The Complainant requested on March 1, 2023, the reinstatement of proceedings.

#### 4. Factual Background

The Complainant is a corporation established under the laws of the State of Utah in August 1992 and headquartered in Springville, Utah, United States. The Complainant produces and sells a range of “lifestyle products, including personal care products, health and wellness products and household products”. It appears that the Complainant acquired the business of a predecessor that formerly marketed such products under the mark NEWAYS, but the Complainant has branded its products as MODERE since 2013. The online database of the Utah Division of Corporations and Commercial Code shows that the Complainant has several registered trade names based on the coined name “Modere”, such as “Modere Inc.”, registered since August 2013.

The Complainant advertises and sells its products directly to consumers through its website at “www.modere.com”, with versions for markets in the United States, Canada, Australia, United Kingdom, Europe, New Zealand, Japan, and India. The Complainant also operates a website directed at the United Kingdom market at “www.modere.co.uk”. These websites are linked with social media sites as well. In addition, the Complainant sells its products through a network of distributors in several countries. The Complainant reported annual revenues of USD 73 million in 2021, when the Complainant was listed as a “Top 10 Health and Beauty eCommerce Brand” by “Forbes.com”. The Complainant was also ranked as the “#1 Fastest Growing Woman-Led Company of 2021” by The Women Presidents’ Organization and JPMorgan Chase bank. The Complainant’s website lists awards for MODERE products in 2015, 2018, 2019, and 2019.

The Complainant holds trademark registrations comprising or including MODERE, including the following:

MARK	JURISDICTION	REGISTRATION NUMBER	REGISTRATION DATE
MODERE (standard characters)	United States	4610685	September 23, 2014
MODERE (standard characters)	United States	4610686	September 23, 2014
MODERE (standard characters)	United States	4610687	September 23, 2014
MODERE (standard characters)	United States	4610688	September 23, 2014
MODERE (standard characters)	United States	4682557	February 3, 2015
MODERE (standard characters)	United States	4685460	February 10, 2015

The Registrar reports that the disputed domain name was registered on March 19, 2021, and was registered in the name of a domain privacy service. After receiving notice of the Complaint in this proceeding, the Registrar identified the underlying registrant as the Respondent Kendra Roman, listing the organization as Roman Creative, with a postal address in the State of Michigan, United States and a contact email address in the domain <romancreative.co>.

The Panel notes<sup>1</sup> that this is the domain name used for the website of the digital marketing agency “Roman Creative”. The “About” page of that website names Kendra Roman as a founder of Roman Creative. That firm, based in Whitehall, Michigan, United States, describes itself as “a digital marketing agency providing Google Ads, social ads, and holistic e-commerce solutions to passionate businesses and brands around the world.” According to the online database of the Michigan Secretary of State, Roman Creative LLC is a Michigan limited liability company established in February 2017. Kendra Roman is shown as an owner. Based on these facts, it appears that Kendra Roman and Roman Creative LLC have shared interests and control concerning the disputed domain name, and the Panel refers hereafter to those parties collectively as the “Respondent”.

The Complaint attaches screenshots of the website to which the disputed domain name resolved in January 2022, for a company called “Modere Co” founded by a couple named “Dan and Kendra” selling an “Aura” bladeless fan and air purifier. The Panel notes that the online database operated by the Michigan Department of Licensing and Regulatory Affairs lists Modere LLC as a Michigan limited liability company established on March 18, 2021, with Kendra Roman as the registered agent. The Panel notes that the Internet Archive’s Wayback Machine has screenshots of the Modere Co website advertising this product throughout 2022.

At the time of this Decision, the disputed domain name resolves to a landing page that appears to be directed to the owner of the disputed domain name. It displays the logo of the Shopify eCommerce platform and invites the site visitor to enter the disputed domain name and go to “domain settings”. The page also has tabs that allow visitors to set up an online store, sign up for Shopify, or “Buy a Store”.

## **5. Parties’ Contentions**

### **A. Complainant**

The Complainant asserts that the disputed domain name is confusingly similar to its registered MODERE trademarks and that the Respondent has no permission to use those marks or other rights or legitimate interests in the disputed domain name. Because the Complainant’s mark is a “made up” term that was highly advertised and in the same field of “health and wellness” as the Respondent’s air purifier, the Complainant argues that the Respondent “knew or should have known” of the existence of the Complainant’s mark, and the Respondent must be presumed to have intended to “piggyback on the Complainant’s reputation”. The Complainant shows that the Respondent’s Instagram account displayed a logo consisting of a lower-case, white letter “m” in a black shaded circle, which the Complainant argues is a deliberate emulation of the Complainant’s registered United States design trademark consisting of a white capital letter “M” partly enclosed in a black shaded circle (United States trademark registration number 6495697, registered on September 28, 2021). The Complainant cites the Policy, paragraph 4(b)(iv), arguing that the Respondent used the disputed domain name to create a likelihood of confusion in an effort to misdirect Internet users for commercial gain.

### **B. Respondent**

The Respondent did not reply to the Complainant’s contentions. In response to the Complaint and standard notifications from the Center, the Respondent sent an informal communication to the Center on December 28, 2022, stating “I am confused by this email. What is being asked for?”. The Respondent did not submit further communications following the several extensions noted above to facilitate settlement discussions between the Parties.

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<sup>1</sup> Noting in particular the general powers of a panel articulated *inter alia* in paragraphs 10 and 12 of the UDRP Rules, it has been accepted that a panel may undertake limited factual research into matters of public record if it would consider such information useful to assessing the case merits and reaching a decision.

## 6. Discussion and Findings

Paragraph 4(a) of the Policy provides that in order to divest a respondent of a domain name, a complainant must demonstrate each of the following: (i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) the respondent has no rights or legitimate interests in respect of the domain name; and (iii) the domain name has been registered and is being used in bad faith. Under paragraph 15(a) of the Rules, “[a] Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable”.

### A. Identical or Confusingly Similar

The first element of a UDRP complaint “functions primarily as a standing requirement” and entails “a reasoned but relatively straightforward comparison between the complainant’s trademark and the disputed domain name”. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”), section 1.7.

The Complainant holds trademark registrations for MODERE as a word mark. The disputed domain name incorporates this mark in its entirety, adding the letters “co”, a common abbreviation for “company”. “Where the relevant trademark is recognizable within the disputed domain name, the addition of other terms (whether descriptive, geographical, pejorative, meaningless, or otherwise) would not prevent a finding of confusing similarity under the first element.” *Id.*, section 1.8. As usual, the addition of the generic Top-Level Domain “.com” may be disregarded as a standard registration requirement (see *id.* section 1.11.1).

The Panel finds that the disputed domain name is confusingly similar to the Complainant’s mark and concludes that the Complainant has established the first element of the Complaint.

### B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy gives non-exclusive examples of instances in which a respondent may establish rights or legitimate interests in a domain name, by demonstrating any of the following:

- (i) before any notice to it of the dispute, the respondent’s 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) the respondent has been commonly known by the domain name, even if it has acquired no trademark or service mark rights; or
- (iii) the respondent is 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.

Because a respondent in a UDRP proceeding is in the best position to assert rights or legitimate interests in a domain name, it is well established that after a complainant makes a *prima facie* case, the burden of production on this element shifts to the respondent to come forward with relevant evidence of its rights or legitimate interests in the domain name. See [WIPO Overview 3.0](#), section 2.1.

The Complainant has demonstrated trademark rights and denies any association with the Respondent. The disputed domain name has been used for the Respondent’s commercial website and, more recently, appears to be incompletely configured for use as an ecommerce site. Thus, the Complainant has made a *prima facie* case, and the burden of production shifts to the Respondent.

The Respondent did not respond to the Complaint. The Panel notes evidence that in the recent past the Respondent has been “commonly known by the domain name” and has used or made demonstrable

preparations to use a corresponding name in connection with a *bona fide* offering of goods or services. On March 18, 2021, the day before the Respondent registered the disputed domain name, the Respondent Kendra Roman registered Modere LLC as a limited liability company in Michigan, as its agent, and the disputed domain name was used for the website of “Modere Co” through at least December 2022, advertising and selling an air filter and purifier as its “first product”, with links from social media sites on Facebook and Instagram. It is not clear that this business continues to be active, however. At the time of this Decision, the “Modere Co” Facebook and Instagram sites no longer appear on those platforms, and the Modere Co website has been replaced with an uncompleted Shopify landing page, as mentioned above. Thus, in the absence of a Response with evidence of current rights or legitimate interests, the Panel cannot find that the Respondent has met its burden of production and concludes that the Complainant prevails on the second element of the Complaint. See [WIPO Overview 3.0](#), section 2.11: “Panels tend to assess claimed respondent rights or legitimate interests in the present, i.e., with a view to the circumstances prevailing at the time of the filing of the complaint. . . . Panels will often also consider any evidence of previous legitimate use under the third UDRP element.”

### **C. Registered and Used in Bad Faith**

The Policy, paragraph 4(b), furnishes a non-exhaustive list of circumstances that “shall be evidence of the registration and use of a domain name in bad faith”, including the following cited by the Complainant (in which “you” refers to the registrant of the domain name):

“(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other online location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of your website or location or of a product or service on your website or location.”

The Complainant infers that the Respondent “knew or should have known” of the existence of the Complainant’s MODERE mark because the mark is a “made up” name that is “highly distinctive”, heavily advertised and in use for some eight years before the Respondent registered the disputed domain name, duly registered as a trademark on a publicly accessible trademark database, and used for health and wellness products, “closely related” to the air purifier product promoted by the Respondent for its “health and wellness” benefits. Moreover, the Complainant points to the Respondent’s circle “m” logo as a deliberate effort at impersonation of the Complainant’s registered circle “M” mark.

The Complainant’s mark is not a dictionary term. The Complainant insists that the Respondent’s choice of the term cannot be coincidental, but this is not outside the realm of possibility. A company with USD 73 million turnover is not necessarily a household name. And the Parties’ products do not appear to compete. The Respondent used the disputed domain name to advertise a single product, a bladeless electric fan with air purification features. The Complainant sells a range of cosmetics, vitamin supplements and health foods, and household cleaning products. On social media, the Respondent used a logo with a small letter “m” in a black circle, compared to the capital “M” partly enclosed in a black circle that comprises one of the Complainant’s trademarks. There is some similarity, but it is not surprising that both companies would highlight the first letter of the company name in a logo.

Importantly, the Respondent incorporated a company with a name corresponding to the disputed domain name and operated under that name while offering the electric fan online. Indeed, the online database of the United States Patent and Trademark Office (“USPTO”) shows that the Respondent’s company Modere LLC applied on July 20, 2021, to register MODERE as a standard character trademark for “electric fans; electric bladeless fans; air purifiers; electric space heaters” (Serial Number 90857896). This was before the Modere Co website was published, and the trademark application was filed on an “intent to use” basis. The application was published, and no objection was filed. USPTO published a Notice of Allowance on August 2, 2022. The application was abandoned on March 6, 2023 “because no Statement of Use or Extension Request timely filed after Notice of Allowance was issued”.

Thus, it appears that the Respondent established a Modere LLC company and applied for a MODERE trademark in 2021, launched a website and social media sites advertising an electric fan and air purifier in 2022, but ultimately abandoned the business and the trademark application in 2023. These facts do not resemble classic cybersquatting or an attempt to “hijack” the reputation of a company selling very different health and wellness products, as the Complainant infers. The Complainant bears the burden of persuasion to establish bad faith, and the Panel is simply not persuaded on this record that the Respondent was more likely than not targeting the Complainant’s mark, both in registering the disputed domain name and in establishing the similarly named company and applying for a similar trademark of its own.

The Panel concludes that the Complainant has not established the third element of the Complaint.

## **7. Decision**

For the foregoing reasons, the Complaint is denied.

*/W. Scott Blackmer/*

**W. Scott Blackmer**

Sole Panelist

Date: March 9, 2023