

ADMINISTRATIVE PANEL DECISION

Exness Holdings CY Ltd v. vithaya Souphalack, BC and WP company
Case No. DCO2022-0030

1. The Parties

The Complainant is Exness Holdings CY Ltd, Cyprus, internally represented.

The Respondent is vithaya Souphalack, BC and WP company, Lao People's Democratic Republic.

2. The Domain Name and Registrar

The disputed domain name <exnes.co> is registered with Instra Corporation Pty Ltd. (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on April 13, 2022. On April 13, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On April 18, 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 and contact information in the Complaint. The Center sent an email communication to the Complainant on April 22, 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 amendment to the Complaint on April 25, 2022.

The Center verified that the Complaint together with the amendment to the 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 April 26, 2022. In accordance with the Rules, paragraph 5, the due date for Response was May 16, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on May 18, 2022. The Respondent sent an email communication to the Center on May 20, 2022.

The Center appointed Luca Barbero as the sole panelist in this matter on June 3, 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 part of the Exness Group, which is a global multi-asset broker, offering a broad range of instruments from multiple asset classes since 2008.

The Exness Group enjoys a global presence and is licensed and regulated by the following financial supervisory authorities worldwide: Financial Conduct Authority (in the United Kingdom), CySEC (in Cyprus), Financial Sector Conduct Authority (in South Africa), Financial Services Commission (in Mauritius), Financial Services Commission (in the British Virgin Islands), Central Bank (in Curaçao and Sint Maarten (Dutch part)), Financial Services Authority (in Seychelles).

The Complainant is the owner, amongst others, of the following trademark registrations for EXNESS:

- International trademark registration No. 1133115 for EXNESS (word mark), registered on September 12, 2012, in class 36;
- International trademark registration No. 1119502 for EX EXNESS (figurative mark), registered on January 19, 2012, in class 36.

The Complainant's affiliated company is the owner of the domain name <exness.com>, which was registered on August 26, 2008, and is used by the Exness Group to promote its financial services under the trademark EXNESS.

The disputed domain name <exnes.co> was registered on August 19, 2021, and has been pointed to a website offering cryptocurrency exchange and trading services.

5. Parties' Contentions

A. Complainant

The Complainant contends that the disputed domain name <exnes.co> is confusingly similar to the trademark EXNESS in which the Complainant has rights as it reproduces the trademark in its entirety with the mere deletion of a letter "s" and the addition of the country code Top-Level Domain ("ccTLD") ".co".

With reference to rights or legitimate interests in respect of the disputed domain name, the Complainant states that the Respondent has in no way been authorized by the Complainant to use its trademark EXNESS for any domain name nor for any other purpose, has never acquired any trademark rights in the trademark EXNESS and is therefore also not commonly known by the disputed domain name.

The Complainant highlights that the Respondent is exploiting the Complainant's goodwill by offering cryptocurrency exchange services under the name "Exnes" on the website to which the disputed domain name resolves. The Complainant also underlines that the services offered by the Respondent are similar to those provided by the Complainant and fall under class 36 of the Nice Classification for which the EXNESS word mark has been registered. In view of the aforementioned, the Complainant asserts that no contemplated *bona fide* or legitimate use of the disputed domain name could reasonably be claimed.

With reference to the circumstances evidencing bad faith, the Complainant indicates that the Respondent must have been aware of the Complainant and its trademark EXNESS at the time of registering the disputed domain name, since the Complainant registered the EXNESS trademarks since 2012 and has been using these trademarks since 2011.

The Complainant informs the Panel that, on January 7, 2022, it sent a cease-and-desist letter to the Respondent, at the email address published on the website "cryptoj484@[...]", requesting to stop its

infringing activities in connection with the trademark EXNESS, but the Respondent did not reply to such communication.

The Complainant underlines that the Respondent could hardly claim ignorance of the Complainant, its activities, and its trademark EXNESS, since it is using on its website an image which is nearly identical to the Complainant's EX EXNESS figurative mark.

Moreover, the Complainant contends that the Respondent's website also offers cryptocurrency exchange, over-the-counter (OTC) trading and spot trading services, which are exactly the type of services for which the trademark EXNESS was registered and for which the Complainant is recognized as a leading provider and submits that, in making such use of the disputed domain name, the Respondent intentionally attempted to attract Internet users, by creating a likelihood of confusion with the Complainant. The Complainant highlights that the Respondent is giving the false impression that its website is owned by the Complainant and, as a result, it is attracting traffic to its website whilst attempting to capitalize on the Complainant's prestigious reputation.

B. Respondent

The Respondent did not file a timely Response.

However, on May 20, 2022, the Respondent sent an email communication to the Center, in reply to the Notification of Respondent's default, in which it claimed that it does not own the disputed domain name and it operates as a freelance domain reservation service provider and it registered the disputed domain name on behalf of a third party operating the website at the disputed domain name. The Respondent also stated to have forwarded the Center's notification of the Complaint to the website owner at the email address "cryptoj484@[...]", but received no answer. The Respondent further stated that it could not afford to pay the administrative fee and asked whether it could close the website at the disputed domain name.

The Center replied to the above communication on May 24 2022, acknowledging the Respondent's assertion that the registration of the disputed domain name had been made on behalf a third party and stating that it would have been up to the Panel to assess such assertion.

No further communications were received thereafter from the Respondent and the alleged beneficial owner of the disputed domain name.

6. Discussion and Findings

According to 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." Paragraph 4(a) of the Policy directs that the Complainant must prove each of the following:

- (i) that the disputed domain name registered by the Respondent is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- (ii) that the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) that the disputed domain name has been registered and is being used in bad faith.

6.1 Preliminary Procedural Issue: Identification of the Proper Respondent

Paragraph 1 of the Rules defines the "Respondent" as the "holder of the domain-name registration against which a complaint is initiated". As stated in *PHE, Inc. v. Aisha Haider*, WIPO Case No. [D2007-0992](#), "[n]either this definition, nor other provisions of the Policy and Rules, prevent a finding that a person or entity,

other than the named registrant in the Whois details for the domain name, may be treated as the holder of the domain name registration *in fact*”.

In the present case, the Registrar-identified registrant of the disputed domain name indicated to the Center, in its email communication of May 20, 2022, in reply to the Notification of Respondent’s default, that the beneficial owner of the disputed domain name was the operator of the correspondent website “www.exnes.co”, which could be contacted at the email address “cryptoj484@[...]”, displayed on such website.

The Panel notes that no additional contact details have been provided by the Registrar-identified registrant of the disputed domain name as to the alleged beneficial owner besides the latter’s email address. On the other hand, the Notification of the Complaint has been sent by the Center also to the email address “cryptoj484@[...]” published on the website at the disputed domain name but no communication has been received from such email address.

The Panel further notes that the communication received by the Respondent points towards the idea that it was hired for registering the disputed domain name for the person/entity operating the website at the disputed domain name, but there is no evidence on the existence and nature of such relationship.

Based on the elements submitted, the Panel is not in a position to determine whether the actual domain holder might be a person or entity other than the Registrar-identified registrant of the disputed domain name. The Panel agrees with the findings in *Bryan Cave Leighton Paisner LLP v. Job*, WIPO Case No. [D2020-0592](#), “[t]he existence of a beneficial holder should not serve generally to renege on the obligations and responsibilities that a registrant of a domain name has by virtue of its registration. The Panel considers that if the disputed domain name is not being used by the registrant itself, the registrant should adopt such measures that are necessary to tend to ensure the proper and *bona fide* use of its registered domain name (for example via contractual obligations in a license to use the disputed domain name) and should not turn a blind eye or expect a disclaimer of its responsibility merely because of the use is being carried out by a beneficial holder and not the registrant itself.”

As a consequence, the Panel has decided in this case to consider that the Registrar-identified registrant of the disputed domain name is the sole Respondent.

6.2 Substantive issues

A. Identical or Confusingly Similar

The Panel finds that the Complainant has established rights over the trademark EXNESS based on the trademark registrations cited under section 4 above.

It is well accepted that the first element functions primarily as a standing requirement, and that the threshold test for confusing similarity involves a reasoned but relatively straightforward comparison between a complainant’s trademark and the disputed domain names to assess whether the trademark is recognizable within the disputed domain name (section 1.7 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”).

In the case at hand, the Complainant’s trademark EXNESS is entirely reproduced in the disputed domain name, with the mere deletion of the last letter “s” and the addition of the ccTLD “.co”, which is commonly disregarded under the first element confusing similarity test (section 1.11 of the [WIPO Overview 3.0](#)).

The Panel finds that the mere deletion of the letter “s” from the trademark EXNESS does not prevent a finding of confusing similarity between the disputed domain name and the Complainant’s trademark as the disputed domain name may be interpreted as a misspelling of the trademark EXNESS and the Complainant’s trademark remains recognizable in the disputed domain name. Indeed, as stated in section 1.9 of the [WIPO Overview 3.0](#), “A domain name which consists of a common, obvious, or intentional

misspelling of a trademark is considered by panels to be confusingly similar to the relevant mark for purposes of the first element”.

Therefore, the Panel finds that the Complainant has proven that the disputed domain name is confusingly similar to a trademark in which the Complainant has established rights according to paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests

It is well established that the burden of proof lies on the complainant. However, satisfying the burden of proving a lack of the respondent's rights or legitimate interests in respect of the domain name according to paragraph 4(a)(ii) of the Policy is potentially quite onerous, since proving a negative circumstance is always more difficult than establishing a positive one.

Accordingly, in line with the UDRP precedents, it is sufficient that the Complainant shows a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name in order to shift the burden of production on the Respondent. If the Respondent fails to demonstrate rights or legitimate interests in the disputed domain name in accordance with paragraph 4(c) of the Policy or on any other basis, the Complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy (see *Croatia Airlines d.d. v. Modern Empire Internet Ltd.*, WIPO Case No. [D2003-0455](#); *Belupo d.d. v. WACHEM d.o.o.*, WIPO Case No. [D2004-0110](#); *Banco Itau S.A. v. Laercio Teixeira*, WIPO Case No. [D2007-0912](#); *Accor v. Eren Atesmen*, WIPO Case No. [D2009-0701](#)).

In the case at hand, by not submitting a Response, the Respondent has failed to invoke any circumstance that could demonstrate, pursuant to paragraph 4(c) of the Policy, any rights or legitimate interests in the disputed domain name.

Moreover, it has been repeatedly stated that when a respondent does not avail itself of its right to respond to a complaint, it can be assumed in appropriate circumstances that the respondent has no rights or legitimate interests in the disputed domain name (*Nordstrom, Inc. and NIHC, Inc. v. Inkyu Kim*, WIPO Case No. [D2003-0269](#)).

According to the evidence on record, there is no relationship between the Complainant and the Respondent and the Complainant has not authorized the Respondent to register or use its trademark or the disputed domain name. Furthermore, there is no indication before the Panel that the Respondent might be commonly known by the disputed domain name.

As stated and evidenced by the Complainant, which have not been contested by the Respondent, the disputed domain name has been pointed to a website publishing a logo very similar to the Complainant's figurative trademark EX EXNESS and promoting cryptocurrency exchange, OTC trading and spot trading services, which directly compete with the services provided by the Complainant under the trademarks EXNESS and EX EXNESS.

In view of the above-described use of the disputed domain name, the Panel finds that the Respondent has not used the disputed domain name in connection with a *bona fide* offering of goods or services or a legitimate noncommercial or fair use without intent for commercial gain to misleadingly divert consumers or to tarnish the Complainant's trademarks.

Therefore, the Panel finds that the Complainant has proven that the Respondent has no rights or legitimate interests in the disputed domain name according to paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

Paragraph 4(a)(iii) of the Policy requires that the Complainant prove that the disputed domain name was registered and is being used by the Respondent in bad faith.

As to the bad faith at the time of registration, the Panel notes that, in light of the Complainant's prior registration and use of the trademarks EXNESS/EX EXNESS in connection with the Complainant's financial services, also online via the website to which the domain name <exness.com> resolves, and considering the Respondent's resolution of the disputed domain name to a website providing financial services competing with the ones of the Complainant and featuring a logo very similar to the Complainant's figurative trademark, the Respondent clearly had the Complainant's trademarks EXNESS/EX EXNESS in mind when it registered the disputed domain name that is confusingly similar to these trademarks.

In view of the above-described use of the disputed domain name made by the Respondent, the Panel also finds that, on balance of probabilities, the Respondent has intentionally attempted to attract Internet users to its website, by creating a likelihood of confusion with the Complainant's trademarks as to the source, sponsorship, affiliation, or endorsement of the Respondent's website and the services promoted therein, according to paragraph 4(b)(iv) of the Policy.

Therefore, the Panel finds that the Complainant has also proven that the disputed domain name was registered and is being used in bad faith according to 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 disputed domain name, <exnes.co>, be transferred to the Complainant.

/Luca Barbero/

Luca Barbero

Sole Panelist

Date: June 18, 2022