

## **ADMINISTRATIVE PANEL DECISION**

Priority Payment Systems LLC. v. Bryan Taube

Case No. D2023-0164

### **1. The Parties**

The Complainant is Priority Payment Systems LLC., United States of America (“United States”), represented by Troutman Pepper Hamilton Sanders LLP, United States.

The Respondent is Bryan Taube, United States.

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

The disputed domain name <mxexmerchant.com> (the “disputed domain name”) is registered with NameCheap, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on January 12, 2023, against the disputed domain name along with three other domain names. On January 13, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the four domain names challenged in the Complaint. On January 13, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain names, which differed from the named Respondent (Privacy service provided by Withheld for Privacy ehf) and contact information in the Complaint. The Center sent an email communication to the Complainant on January 17, 2023 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 January 22, 2023, listing only the disputed domain name.

The Center verified that 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 amended Complaint and the proceedings commenced on January 25, 2023. In accordance with the Rules, paragraph 5, the due date for Response was February 14, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on February 20, 2023.

The Center appointed David H. Bernstein as the sole panelist in this matter on February 27, 2023. 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 payments and banking services provider that helps businesses and financial institutions process payments, manage business accounts, and monetize payment networks.

In 2008, the Complainant launched its MX Merchant platform, which allows businesses to receive and process electronic payments from their customers. MX Merchant is part of the Complainant's larger family of MX trademarks, including MX Express, MX Enterprise, and MX Developer. In 2014, the Complainant registered the domain name <mxmerchant.com>. The website acts as a portal for MX Merchant's users, who enter customer credit card information on the website for the purpose of initiating refunds.

The Respondent registered the disputed domain name on or around January 5, 2023. The disputed domain name resolves to a website that appears to be a near-identical copy of the Complainant's website. However, the <mxexmerchant.com> website does not appear to offer any goods or services; the Complainant alleges that the purpose of the website is to allow the Respondent to obtain account information from MX Merchant users, which the Respondent can then use to file fraudulent refund requests.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant contends that it has acquired common law trademark rights throughout the United States in the MX MERCHANT mark. The Complainant points to (1) its application for federal registration of the mark; (2) its continuous and exclusive use of the mark since 2008; (3) its volume of business under the mark, including 20,000 licensed users who transact nearly USD12 billion in credit card volume annually; (4) its MX Merchant app; (5) its promotion of the mark on its website and LinkedIn; and (6) third-party reviews and discussion of the services offered under the mark, indicating established recognition and goodwill. The Complainant further claims that the disputed domain name is confusingly similar to its mark, differing only in the insertion of "ex" after "mx" and in the addition of the ".com" generic Top-Level Domain ("gTLD").

The Complainant alleges that the Respondent has no rights or legitimate interest in the disputed domain name. The Respondent has no affiliation with the Complainant, and the Complainant never provided the Respondent with a license or other authorization that would permit it to use the MX MERCHANT mark. The Respondent also is not offering any legitimate goods or services under the disputed domain name. Rather, the Complainant alleges, the Respondent is engaged in "typosquatting": adopting a domain name with a misspelled version of the Complainant's mark to take advantage of typographical errors made by users attempting to reach the MX Merchant website. By adopting a near-identical copy of the Complainant's website, the Respondent intends to trick users into entering their sensitive MX Merchant account information, which the Respondent can use for his own financial gain.

The Complainant contends that the disputed domain name was registered and is being used in bad faith. The Complainant states that the Respondent clearly knew about the MX MERCHANT mark when he registered the disputed domain name, as he adopted a domain name just two letters different from the Complainant's and used that domain name to create a website almost identical to the Complainant's. The Respondent's sole purpose in creating the website, according to the Complainant, was to acquire consumer financial information. This evidence of both typosquatting and phishing constitutes bad faith and demonstrates that the Respondent intended to take advantage of the Complainant's established business and goodwill.

The Complainant therefore requests that the Panel transfer the disputed domain name to the Complainant.

## B. Respondent

The Respondent did not reply to the Complainant's contentions.<sup>1</sup>

## 6. Discussion and Findings

Paragraph 4(a) of the Policy requires that the Complainant prove each of the following three elements in order to obtain transfer of the disputed domain name:

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

As noted above, the Respondent did not submit a Response. Pursuant to paragraph 5(f) of the Rules, the Panel may proceed to a decision based on the amended Complaint and may rely on any supported and nonconclusory allegations in the amended Complaint, as well as reasonable inferences that may be drawn therefrom. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.3. However, the Complainant is still obligated to prove its entitlement to the requested relief by a preponderance of the evidence. See *The Knot, Inc. v. In Knot We Trust LTD*, WIPO Case No. [D2006-0340](#).

### A. Identical or Confusingly Similar

The first issue the Panel must resolve is whether the Complainant has protectable rights in the MX MERCHANT mark. "To establish . . . common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant's goods and/or services." Evidence of a mark's acquired distinctiveness can include the duration of use, the volume of sales, the amount of advertising, and public recognition. "The fact that a respondent is shown to have been targeting the complainant's mark" may also support a finding that the mark has "achieved significance as a source identifier". [WIPO Overview 3.0](#), section 1.3.

The Complainant's pending trademark application is insufficient to establish trademark rights. [WIPO Overview 3.0](#), section 1.1.4. However, the Complainant has established common law trademark rights based on use of the MX MERCHANT mark in commerce. The Complainant asserts that it has continuously and exclusively used the MX MERCHANT mark since 2008. In that time, over 20,000 licensed users have signed up for the financial processing services offered under the mark and have transacted nearly USD 12 billion in credit card transactions. An MX Merchant mobile app is available for download, and the MX Merchant website is sufficiently well-established for the Respondent to attempt to create a duplicate to attract the Complainant's users. The Complainant has also submitted evidence of its promotion of MX Merchant on LinkedIn and of users reviewing the MX Merchant services on websites like Capterra and CardFellow.

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<sup>1</sup> Because there is no Response, the Panel has carefully reviewed the record to ensure that the Center discharged its obligations to give the Respondent fair notice of this proceeding. *Nicole Kidman v. John Zuccarini, d/b/a Cupcake Party*, WIPO Case No. [D2000-1415](#). The Center sent notification of the Complaint to the Respondent by email and (DHL) courier. The courier packages, which were sent to the addresses Respondent recorded with the Registrar, could not be delivered because the addresses were not valid. The Center's email, however, appears to have been delivered to the Respondent, as the Center did not receive any notice that the message could not be delivered. The Panel finds that the Center has discharged its obligation to provide fair notice to the Respondent under paragraph 2(a) of the Rules. *Sermo, Inc. v. CatalystMD, LLC*, WIPO Case No. [D2008-0647](#).

Based on this evidence, the Complainant has demonstrated that it has common law rights in the MX MERCHANT mark.

The Panel further finds that the Complainant's mark and the disputed domain name are confusingly similar. The MX MERCHANT mark and the disputed domain name are identical, except that the disputed domain name includes "ex" after "mx" and adds the ".com" gTLD to the end of the mark. These small differences do not prevent a finding of confusing similarity. The addition of a gTLD is generally disregarded in assessing similarity where, as here, the TLD is not incorporated into the trademark. See [WIPO Overview 3.0](#), section 1.11; see also *Alstom v. WhoisGuard Protected, Whois Guard, Inc. / Richard Lopez, Marines Supply Inc*, WIPO Case No. [D2021-0859](#). The insertion of "ex," meanwhile, is an intentional misspelling of the Complainant's MX MERCHANT mark and <mxmerchant.com> domain name and does not dispel the confusing similarity. See [WIPO Overview 3.0](#), section 1.9 ("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. . . . Examples of such typos include . . . the addition or interspersing of other terms or numbers.").

### **B. Rights or Legitimate Interests**

The Complainant has made a *prima facie* showing that the Respondent lacks rights or legitimate interests in the disputed domain name. See [WIPO Overview 3.0](#), section 2.1 (explaining burden-shifting analysis). The disputed domain name is a classic example of typosquatting: it is a confusing, intentional misspelling of the Complainant's mark and domain name used to mislead would-be users of the Complainant's services that the Respondent's website – which is virtually identical to the Complainant's website – is operated by the Complainant. Moreover, the Respondent does not conduct any *bona fide* business through his website. Rather, the Respondent's aim seems to be obtaining the login information of MX Merchant users, so he can then use that information for some fraudulent purpose. Such conduct is paradigmatically illegitimate.

Because the Respondent has not responded to the Complainant's contentions, the Respondent has not rebutted this *prima facie* showing. The Complainant has established the second element of the Policy.

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

"[B]ad faith under the UDRP is broadly understood to occur where a respondent takes unfair advantage of or otherwise abuses a complainant's mark." [WIPO Overview 3.0](#), section 3.1 (providing non-exhaustive list of bad faith scenarios). For the same reasons that the Respondent's use of the disputed domain name is illegitimate, it was also registered and used in bad faith. The Respondent's effort to mislead would-be users of the MX Merchant services through typosquatting and by creating a near-identical copy of the Complainant's website, all with the apparent goal of fraudulent commercial gain or some other illegal activity, clearly suffices to establish bad faith registration and use. [WIPO Overview 3.0](#), section 1.9 ("Under the second and third elements, panels will normally find that employing a misspelling [in a way that suggests typosquatting] way signals an intention on the part of the respondent (typically corroborated by infringing website content) to confuse users seeking or expecting the complainant.").

The Panel's finding of bad faith is further supported by the Respondent's use of a privacy service in his registration of the disputed domain name. Though there can be legitimate reasons to use a privacy service, the Respondent has not articulated any such reasons here. To the contrary, based on the facts of this case, the Panel finds that the Respondent likely used a privacy service to hide his identity, prevent investigation of a phishing scheme, and frustrate the Complainant's ability to seek action against him – as evidenced by the fact that the address the Respondent provided in connection with his registration was invalid. See [WIPO Overview 3.0](#), section 3.6 ("Where it appears that a respondent employs a privacy or proxy service merely to avoid being notified of a UDRP proceeding filed against it, panels tend to find that this supports an inference of bad faith.").

## 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 <mxexmerchant.com> be transferred to the Complainant.

*/David H. Bernstein/*

**David H. Bernstein**

Sole Panelist

Date: March 13, 2023