

## **ADMINISTRATIVE PANEL DECISION**

Bayer AG v. Flemmy Davids

Case No. D2023-1703

### **1. The Parties**

The Complainant is Bayer AG, Germany, represented by BPM Legal, Germany.

The Respondent is Flemmy Davids, United Kingdom.

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

The disputed domain name <bayerenergyservices.com> is registered with NameCheap, Inc. (the "Registrar").

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on April 19, 2023. On April 20, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On April 20, 2023, 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 (Redacted for Privacy, Privacy service provided by Withheld for Privacy ehf) and contact information in the Complaint. The Center sent an email communication to the Complainant on April 27, 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 April 28, 2023.

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 2, 2023. In accordance with the Rules, paragraph 5, the due date for Response was May 22, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on June 8, 2023.

The Center appointed Wilson Pinheiro Jabur as the sole panelist in this matter on June 19, 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 operates in the health care, nutrition, and plant protection businesses on five continents, manufacturing and selling, *inter alia*, pharmaceutical and medical care products, veterinary products, diagnostic products, and agricultural chemicals.

The Complainant's history dates back to 1863, when the firm of "Friedrich Bayer & Co." was established in the town of Elberfeld, now part of the city of Wuppertal in Germany. In 1881, the name was transferred to a stock corporation called "Farbenfabriken vorm. Friedrich Bayer & Co." which began manufacturing and marketing pharmaceutical products in 1888 and has sold such products under the BAYER trademark ever since.

The Complainant is the owner of the following, amongst numerous others, trademarks (Annex 7 to the Complaint):

- International trademark registration No. 1462909, for BAYER, registered on November 28, 2018, in classes 1, 3, 5, 9, 10, 31, 35, 41, 42 and 44;
- International trademark registration No. 1476082, for BAYER, registered on December 10, 2018, in classes 7, 8, 11, 16, 20, 24, 25, 28, 30, 32, 37, 38, 39, 40, 43 and 45.

The disputed domain name was registered on March 16, 2023 and presently does not resolve to an active webpage. The disputed domain name has been used in the past in connection with a webpage displaying pay-per-click ("PPC") links as well as in connection with a fraudulent email scheme offering fake jobs by impersonating the Complainant (Annex 11 to the Complaint).

#### 5. Parties' Contentions

##### A. Complainant

The Complainant asserts to be a global enterprise headquartered in Germany, holding over 374 consolidated companies in 83 countries and counting with more than 101,000 employees worldwide, doing business on all five continents, manufacturing and selling numerous of products, *inter alia*, human pharmaceutical and medical care products, diagnostic products, and agricultural chemicals.

As a result of the exclusive and extensive use, the Complainant further asserts that its BAYER trademark has acquired a significant goodwill and become widely known, as recognized by previous decisions decided under the UDRP for more than 20 years which have consistently found that the Complainant's BAYER trademark is well known (Annex 9 to the Complaint).

According to the Complainant, the Complainant's BAYER trademark is entirely reproduced and clearly recognizable in the disputed domain name, and the addition of the terms "energy" and "services" does not eliminate the similarity between the trademark and the disputed domain name.

Also according to the Complainant, the Respondent has no rights or legitimate interests in the disputed domain name given that:

- (i) the Complainant's BAYER trademark is well known and obviously connected with the Complainant and its products, "Bayer" not being a word any market participant would legitimately choose unless seeking to create an impression of an association with the Complainant;

- (ii) the Complainant has not licensed or otherwise permitted the Respondent to use any of its trademarks and has not permitted the Respondent to apply for or use any domain name incorporating the BAYER trademark;
- (iii) there is no evidence that the Respondent's use of, or demonstrable preparations to use the disputed domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services, rather the Respondent used the disputed domain name in connection with an email scam in an attempt to extract money from potential job candidates;
- (iv) there is no evidence which suggests that the Respondent is or has been commonly known by the disputed domain name.

The Complainant contends that the registration of the disputed domain name was done clearly in bad faith given that the BAYER trademark is a highly distinctive and well-known trademark solely connected with the Complainant and would not be an expression that a trader would legitimately choose unless seeking to create an undue association with the Complainant's trademark. Furthermore, the Complainant contends that the Respondent deliberately targeted the Complainant in view of the Respondent's fraudulent activities seeking to impersonate the Complainant.

The Complainant further contends that the Respondent is preventing the Complainant from reflecting its trademark in a corresponding domain name.

## **B. Respondent**

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

## **6. Discussion and Findings**

Paragraph 4(a) of the Policy sets forth three requirements, which have to be met for this Panel to order the transfer of the disputed domain name to the Complainant:

- (i) the disputed 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 disputed domain name; and
- (iii) the disputed domain name has been registered and is being used in bad faith.

The Complainant must prove in this administrative proceeding that each of the aforesaid three elements is present in order to obtain the transfer of the disputed domain name.

### **A. Identical or Confusingly Similar**

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves 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.

Based on the available record, the Panel finds the Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

The Panel finds the entirety of the mark is reproduced within the disputed domain name. Accordingly, the disputed domain name is confusingly similar to the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

While the addition of other terms “energy” and “services” may bear on assessment of the second and third elements, the Panel finds the addition of such terms does not prevent a finding of confusing similarity between the disputed domain name and the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.8.

Based on the available record, the Panel finds the first element of the Policy has been established.

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

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

While the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of “proving a negative”, requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the record, the Panel finds the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name. The Respondent has not rebutted Complainant’s *prima facie* showing and has not come forward with any relevant evidence demonstrating rights or legitimate interests in the disputed domain name.

The Panel considers that the record of this case reflects that:

- before any notice to the Respondent of the dispute, the Respondent did not use, nor has him made demonstrable preparations to use, the disputed domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services. Paragraph 4(c)(i) of the Policy, and [WIPO Overview 3.0](#), section 2.2; and
- the Respondent (as an individual, business, or other organization) has not been commonly known by the disputed domain name. Paragraph 4(c)(ii) of the Policy, and [WIPO Overview 3.0](#), section 2.3; and
- the Respondent is not making a legitimate noncommercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue. Paragraph 4(c)(iii) of the Policy, and [WIPO Overview 3.0](#), section 2.4; and
- the record contains no other factors demonstrating rights or legitimate interests of the Respondent in the disputed domain name. Moreover, panels have held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) can never confer rights or legitimate interests on a respondent. [WIPO Overview 3.0](#), section 2.13.1.

Based on the available record, the Panel finds the second element of the Policy has been established.

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

The Panel notes that for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular but without limitation, that if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith.

The Respondent has registered the disputed domain name, which incorporates the Complainant's prior registered trademark BAYER in its entirety, and has used it for a fraudulent email scheme offering fake jobs by impersonating the Complainant. The website associated with the disputed domain name displays PPC links.

The Panel considers that the record of this case reflects that the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other on-line location, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's web site or location or of a product or service on the Respondent's website or location. Paragraph 4(b)(iv) of the Policy, and [WIPO Overview 3.0](#), section 3.1.4.

Also, panels have held that the use of a domain name for illegal activity (*e.g.*, the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) constitutes bad faith. [WIPO Overview 3.0](#), section 3.4.

Although the disputed domain name currently does not resolve to an active website, panels have found that the non-use of a domain name (including a blank or "coming soon" page) would not prevent a finding of bad faith under the doctrine of passive holding. Having reviewed the record, the Panel finds the present non-use of the disputed domain name does not prevent a finding of bad faith in the circumstances of this proceeding. While panelists will look at the totality of the circumstances in each case, factors that have been considered relevant in applying the passive holding doctrine include: (i) the degree of distinctiveness or reputation of the complainant's mark, (ii) the failure of the respondent to submit a response or to provide any evidence of actual or contemplated good-faith use, (iii) the respondent's concealing its identity or use of false contact details (noted to be in breach of its registration agreement), and (iv) the implausibility of any good faith use to which the domain name may be put. [WIPO Overview 3.0](#), section 3.3. Having reviewed the record, and considering the reputation of the Complainant's trademark, the Respondent's choice to retain a privacy protection service to conceal his identity, the Respondent's lack of reply to the procedure, and the implausibility of any good faith use to which the disputed domain name may be put, the Panel finds that in the circumstances of this case the passive holding of the disputed domain name does not prevent a finding of bad faith under the Policy.

Based on the available record, the Panel finds the third element of the Policy has been established.

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

*/Wilson Pinheiro Jabur/*

**Wilson Pinheiro Jabur**

Sole Panelist

Date: July 1, 2023