

ADMINISTRATIVE PANEL DECISION

Mr. Gildo Pallanca-Pastor v. Tech Admin, Virtual Point Inc.
Case No. D2020-1698

1. The Parties

The Complainant is Mr. Gildo Pallanca-Pastor, Monaco, represented by BBLM Avocats, France.

The Respondent is Tech Admin, Virtual Point Inc., United States of America (“United States”), represented by Lewis & Lin, LLC, United States.

2. The Domain Name and Registrar

The disputed domain name <voxan.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 June 29, 2020. On June 29, 2020, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On June 30, 2020, 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 July 2, 2020 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 July 3, 2020.

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 July 7, 2020. In accordance with the Rules, paragraph 5, the due date for Response was July 27, 2020. On July 7, 2020, the Complainant submitted an unsolicited filing to the Center. The Response was filed with the Center on July 27, 2020. On July 28, 2020, the Respondent submitted an unsolicited filing to the Center.

The Center appointed Andrew D. S. Lothian as the sole panelist in this matter on August 5, 2020. 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 an individual with an address in Monaco. The Complainant is the holder of various registered trademark rights in the VOXAN mark, which it uses in connection with the conception and commercialization of motorbikes. Among others, the Complainant is the owner of French registered trademark No. 96628771, registered on June 5, 1996 in international classes 12, 14, and 25, and United States registered trademark No. 4457763, registered on December 31, 2013 in international class 12, each for the word mark VOXAN.

The Respondent is a California corporation with a principal place of business in Irvine, California, United States. The Respondent does not give details of its business although it appears from previous cases under the Policy that the Respondent is a web development company that, *inter alia*, purchases domain names and develops websites (see, for example, *Chandler Systems, Incorporated v. Tech Admin, Virtual Point*, WIPO Case No. D2017-1665 and *Laboratoires Thea v. Tech Admin, Virtual Point Inc.*, WIPO Case No. D2018-0039).

According to Registrar verification, the disputed domain name was created on March 24, 2016. Entries on the Internet Archive “Wayback Machine” indicate that, since its creation date, the disputed domain name has been used as follows:

October 10, 2016 to April 5, 2018 (various entries)	Offered for sale via online marketplace and domain name parking service.
June 21, 2018	Parked via online marketplace and domain name parking service although not expressly offered for sale.
May 21, 2019	Web page stating “Voxan is your one-stop resource to learn about dirt bikes, ATVs, UTVs, super-bikes and motorcycles in general [...]”
June 22, 2019	Forwarded to a website at “www.motoshark.com”.

The Respondent provides evidence indicating that it acquired the disputed domain name from the Registrar via an auction process concluded on April 28, 2020. The Respondent shows that it also acquired the domain name <visan.com> on the same date by way of the same process. The Respondent shows that its interest in the disputed domain name was specified on the corresponding Whois record dated May 6, 2020. The disputed domain name is currently used in connection with a website inviting offers to purchase it.

Between May 6, 2020 and May 20, 2020, the Respondent engaged in negotiations over the potential purchase of the disputed domain name with an agent representing the Complainant. The Parties could not agree as to price and the negotiations were abandoned. During the negotiations, the Complainant’s agent indicated that it was acting on behalf of an undisclosed principal but did not disclose the identity of the Complainant or its rights in the VOXAN mark to the Respondent. A counter-offer made by the Respondent at one point in the negotiations proposed a sale of the disputed domain name at the price of USD 290,000. This was rejected by the Complainant’s agent and the negotiations continued. At the time negotiations ceased, the Respondent’s proposed price was USD 144,800 while the Complainant’s proposed price was USD 40,050.

On July 22, 2020, the Respondent filed a court action against the Complainant in the United States District Court for the District of Arizona seeking *inter alia* a declaration and judgment that its registration and use of the disputed domain name is lawful and cancellation of the Complainant’s United States registered trademark No. 4457763 on the basis that the Respondent believes that the Complainant filed a fraudulent specimen of use in respect thereof.

5. Parties' Contentions

A. Complainant

The Complainant contends that the disputed domain name is identical to a trademark in which it owns rights; that the Respondent has no rights or legitimate interests in the disputed domain name; and that the disputed domain name was registered and is being used in bad faith.

The Complainant narrates the terms of various of its VOXAN registered trademarks and notes that the disputed domain name includes this term in its entirety, adding that the extension such as ".com" is typically irrelevant when determining identity or confusing similarity.

The Complainant alleges that the Respondent cannot demonstrate any rights or legitimate interests in the disputed domain name under paragraph 4(c) of the Policy or otherwise, adding that the Respondent was not authorized or licensed by the Complainant to register the disputed domain name, that it does not appear that the Respondent is commonly known by the disputed domain name and that as the disputed domain name is identical to the Complainant's VOXAN mark, the Respondent cannot provide any evidence of intent to use it in connection with a *bona fide* offering of goods or services, nor is the Respondent making a legitimate noncommercial or fair use thereof. The Complainant notes the use of the disputed domain name in 2018 to forward to "www.motoshark.com" and asserts that such use stopped after it issued a cease and desist letter to the operator of said website. The Complainant states that it did not hear from the holder of the disputed domain name and asserts that said holder's identity was only revealed after the Complaint was filed. The Complainant adds that the disputed domain name is now inactive.

The Complainant submits that it is reasonable to infer that the Respondent registered the disputed domain name in full knowledge of the Complainant's trademarks due to the Complainant's activities and number of trademark registrations. The Complainant states that the Respondent was not identified on the Whois extract and that no contact email address was provided (the Panel notes in passing that the Complainant appears to have consulted and in any event has produced only the registry Whois record for the disputed domain name, which does not disclose the Respondent's identity or provide a means of contacting the Respondent but that the Registrar's Whois for the disputed domain name, at least as at July 7, 2020, does disclose the Respondent's identity in the "Registrant Organization" field and provides a means of contacting it).

The Complainant notes that the disputed domain name is being offered for sale and asserts that when contacted by the Complainant, the Respondent "responded that he would not sell the disputed domain name under USD 290,000". The Complainant contends that this is a very large amount of money and that the Respondent cannot ignore the fact that it is infringing the Complainant's trademarks. The Complainant concludes that the Respondent should be considered a passive holder of the disputed domain name, adding that this may be interpreted as bad faith registration and use in terms of paragraph 4(a)(iii) of the Policy.

B. Respondent

The Respondent provides details of the court action which it has commenced against the Complainant and requests that the administrative proceeding be suspended or terminated. Alternatively, the Respondent requests that the Complaint be denied and that the Panel find that the Complaint constitutes an abuse of the administrative proceeding.

The Respondent does not dispute that the Complainant owns registered trademarks in various VOXAN marks and concedes that the disputed domain name is in all respects identical to a trademark in which the Complainant has rights, while noting that the Respondent has asserted a cause of action in its pending litigation against the Complainant to have the Complainant's primary United States trademark invalidated.

The Respondent notes that more than a dozen companies worldwide use the VOXAN trademark, or a variant thereof, and that there are hundreds more "oxan-formative" marks globally. The Respondent asserts that it

has the right to register a non-exclusive term for its potential as a short, pronounceable, catchy and brandable domain name, whether it ultimately decided to develop it or entertain offers for its sale, adding that the Respondent registered another similar term by way of the <visan.com> domain name on the same day. The Respondent contends that the Policy is not intended to permit a party using commonly-used terms as a trademark to bar others from using such term in a domain name unless it is clear that the use involved seeks to capitalize on the goodwill created by the mark owner. The Respondent acknowledges that the disputed domain name is not descriptive but argues that the facts and circumstances of the case establish that it did not target the Complainant's trademark and had never heard of the Complainant when it registered the disputed domain name in April 2020.

The Respondent states that in registering a brandable, fanciful, invented, or coined word domain name, the Respondent was acting in good faith, adding that it did not register the disputed domain name primarily for the purpose of selling it to the Complainant, to prevent a trademark holder from registering it, to divert users looking for the Complainant or in any other way to profit from the Complainant's mark. The Respondent adds that it chose the disputed domain name for the same reason that many other companies have chosen said term as a mark or name. The Respondent denies any knowledge of the Complainant when it registered the disputed domain name and asserts its belief that the Complainant does not sell any products in the United States, adding that the Complainant has been called "almost totally unknown in the United States" by a prominent online motorcycle site (evidence provided).

The Respondent states that the fact that it might have found the Complainant via an online search is of no significance because its trademark rights are not exclusive, adding that at least six companies were using the VOXAN mark when the disputed domain name was registered by the Respondent, while more than a dozen incorporate said term into their name and numerous oxan-formative names are, or have been, in use globally, thus creating a crowded name space. The Respondent submits that there is no basis to conclude that it registered the disputed domain name to target what it describes as "an obscure French motorcycle company, which is almost unknown in the United States", which it notes has spent as much time as a "shuttered brand" as an active one, and which has not sold a motorcycle since 2015.

The Respondent asserts that it acquired the disputed domain name in April 2020, such that the Complainant's allegations regarding its use prior to this date, insofar as directed against the Respondent, are false. The Respondent submits that the Complainant has intentionally misled the Panel that the Respondent's identity was masked, noting that it was not and that its contact information has been publicly available since it acquired the disputed domain name, with reference to a historic WhoIs record therefor. The Respondent further asserts that the Complaint grossly misrepresents the nature and circumstances of the negotiation between the Respondent and the Complainant's agent to purchase the disputed domain name, adding that said agent made the first approach and did not disclose his agency for the Complainant.

The Respondent submits that it is false to say that the Respondent replied to the Complainant that it would not sell the disputed domain name for less than USD 290,000, adding that negotiations were between the Respondent and an agent who did not disclose his principal, and the latter figure was provided in response to an offer during the negotiation process. The Respondent asserts that this is a classic "Plan B" case in that the Complaint was raised after the Complainant attempted to acquire the disputed domain name by negotiations in which an agreed price could not be reached. The Respondent seeks a finding of Reverse Domain Name Hijacking on the basis that the Complainant should have known that its case was fatally weak and should never have been filed, given what it states are the Complainant's baseless and unsupported arguments on the second and third elements of the Policy.

6. Discussion and Findings

To succeed, the Complainant must demonstrate that all of the elements enumerated in paragraph 4(a) of the Policy have been satisfied:

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

A. Preliminary issue: Effect of Court Proceedings

Paragraph 4(k) of the Policy provides:

“Availability of Court Proceedings.

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.”

Paragraph 18 of the Rules provides:

“Effect of Court Proceedings

(a) In the event of any legal proceedings initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, the Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision.

(b) In the event that a Party initiates any legal proceedings during the pendency of an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, it shall promptly notify the Panel and the Provider. See paragraph 8 above.”

Paragraph 18(a) of the Rules thus contemplates the fact that legal proceedings may be initiated prior to or during an administrative proceeding and that the proceeding may be terminated or suspended in consequence, or that the Panel may proceed to a decision, in its discretion. The question of how such discretion should be exercised has been considered in detail in a number of cases under the Policy, most notably by the learned panelist in *DNA (Housemarks) Limited v. Tucows.com Co*, WIPO Case No. D2009-0367. It has also been considered in at least two previous cases under the Policy involving the Respondent and in which it had also resorted to the courts in response to a complaint under the Policy, namely, *Chandler Systems, Incorporated v. Tech Admin, Virtual Point, supra*; and *FastTrak v. Tech Admin, Virtual Point*, WIPO Case No. D2017-0652.

While a number of previous cases under the Policy are in favor of termination in the event of concurrent court proceedings in certain circumstances (see for example the recent case *Citizens For A Better Kenner*,

Inc. v. Scott Sigur, WIPO Case No. D2020-1462)¹ it is nevertheless a widely held view that the Policy generally obliges a panel to make a decision on a complaint (see, for example, the discussion in *BD Real Hoteles, SA de C.V. v. Media Insights aka Media Insight*, WIPO Case No. D2009-0958). Furthermore, in each of the two previous cases noted above involving the Respondent, the panel considered and rejected the Respondent's request to terminate or suspend the administrative proceeding. The reasons given in those cases were, first, that to terminate a proceeding simply on the basis of concurrent court proceedings where there are no apparent exceptional circumstances opens up the possibility of gamesmanship because a respondent could file a court action as a way of undermining or delaying a UDRP proceeding; secondly, that the complainant had sought a decision in the dispute and was entitled to an answer to the question for which it prepared a complaint and paid a filing fee; thirdly, that the Respondent's arguments in the court action were largely the same as it makes (or would make) in the administrative proceeding; and fourthly, that an administrative panel decision may help the parties settle their dispute, in that it can serve the function of an "early neutral evaluation" of the parties' respective cases. Each of these considerations applies equally to the present proceeding and the Panel therefore sees no reason to depart from the approach taken by the panels in said cases.

In all of these circumstances, the Panel denies the Respondent's request for suspension or termination of this administrative proceeding and will therefore proceed to a Decision on the present record. For completeness, and following the lines of the comments of the panel in *Navista S.A. v. Virtual Point Inc. dba CrossPath, It Manager*, WIPO Case No. D2012-1157, the Panel adds that it entertains no notion of what may be done with the Decision after the Panel is *functus officio* and does not address its Decision to the attention of any other forum.

B. Preliminary Issue: Parties' supplemental filings

In terms of paragraph 12 of the Rules, a panel may request, in its sole discretion, further statements or documents from the parties in addition to the complaint and response. The Panel has made no such requests in the present case. Both Parties have however made supplemental filings.

Unsolicited supplemental filings are generally discouraged. Panels have repeatedly affirmed that the party submitting or requesting to submit an unsolicited supplemental filing should clearly show its relevance to the case and why it was unable to provide the information contained therein in its complaint or response.

The Complainant's supplemental filing was received on July 7, 2020, being the day on which the Complaint was notified to the Respondent. The filing contains a version of the Complaint, which, to the Panel's eyes, appears to be an exact match for the Amended Complaint, together with a new "Annex 2 bis" containing various iterations of the Complainant's VOXAN registered trademark in different jurisdictions. There is an open question as to why the Complainant did not file this material at an earlier stage, other than perhaps through oversight. No explanation has been provided by the Complainant other than a comment that this material is being provided in light of new registrant information, something that appears to the Panel to be unconnected to the contents of "Annex 2 bis". Nevertheless, given that it simply contains further exemplification of the Complainant's VOXAN trademarks, which are matters of public record, there seems no reason to the Panel not to allow "Annex 2 bis" to be received and considered in the present matter. The Panel cannot identify any particular prejudice which would be suffered by the Respondent in consequence. The Respondent has had exactly the same opportunity to consider and respond to this material as it has to the Complaint itself, bearing in mind the fact that it was filed on the date of notification of the Complaint. The additional copy of the Complaint, however, will be disregarded on the grounds that this is a duplication of

¹ One of the factors which the panel in that case noted as favoring termination was that the legal claim in the court action was analogous to the legal claim in the administrative proceeding, with no other claims in the litigation, such as for trademark (non-)infringement or cancellation of a trademark registration. That factor does not apply in the present administrative proceeding, given that the corresponding legal claim includes a claim for cancellation of the Complainant's United States trademark registration. There are other points of difference, including the fact that it was the complainant in *Kenner* who filed the lawsuit before the administrative proceeding was initiated, leading to the panel's concern that it was engaging in forum shopping, while in the present case, the lawsuit was filed by the Respondent after the present Complaint was filed.

material already filed.

The Respondent's supplemental filing was received on July 28, 2020. This consists of an email apparently issued by the Respondent, rather than by the Respondent's counsel, informing the Center of the pending court action and requesting suspension or termination of the administrative proceeding. A copy of the complaint in said court action was also provided. The Panel must confess to being slightly puzzled as to why the Respondent decided to make this supplemental filing, given that its counsel had already filed a copy of said complaint as part of its annexes to the Response on the preceding day, and had likewise made a similar request for suspension or termination within the body of the Response itself. As this supplemental filing appears to the Panel's eyes to consist of a complete duplication of material already filed, the Panel declines to consider the Respondent's supplemental filing.

C. Identical or Confusingly Similar

The panel need not dwell on this topic as both of the Parties are agreed that the disputed domain name is identical to the Complainant's trademark in all material respects. The Panel shares their opinion and so finds.

The Respondent notes that it seeks to have the Complainant's United States trademark, as described in the factual background section above, invalidated in the concurrent court proceedings. As far as the Panel can see, such trademark is *ex facie* valid as matters currently stand. In any event, the Complainant has provided evidence of several other registered trademarks, each of which is sufficient, on its own, to fulfil the first element requirement under the Policy that the Complainant show rights in a trademark. Furthermore, the question of identity or confusing similarity has been conceded by the Respondent.

The Panel finds that the requirements of paragraph 4(a)(i) of the Policy have been satisfied.

D. Rights or Legitimate Interests

The requirements of paragraph 4(a) of the Policy are conjunctive. A consequence of this is that failure on the part of a complainant to demonstrate one element of the Policy will result in failure of the complaint in its entirety. Accordingly, in light of the Panel's finding in connection with registration and use in bad faith, discussed below, it is unnecessary for the Panel to address the issue of the Respondent's rights or legitimate interests in the disputed domain name.

E. Registered and Used in Bad Faith

The essence of the Complaint is that the Respondent registered the disputed domain name in the knowledge of the Complainant's rights and with intent to target these. It is important to state at the outset of this topic, however, that one aspect of the Complaint proceeds on a misunderstanding, namely the allegation that the Respondent pointed the disputed domain name to content relevant to the Complainant's trademark after the disputed domain name was created in 2016. The Panel is satisfied that the Respondent was not the registrant at that stage and this evidence must therefore be disregarded in the assessment of the Respondent's conduct under the third element of the Policy.

What does not appear to be in dispute is that the Respondent offered the disputed domain name for general sale as soon as it acquired it and that, during purchase negotiations between the Respondent and the Complainant's agent, the price which the Respondent sought was considerably in excess of the typical registration fee. The Complainant suggests therefore that the Respondent's primary intent was to sell the disputed domain name to the Complainant at such a value and that this constitutes registration and use in bad faith in accordance with paragraph 4(b)(i) of the Policy.

As noted in the factual background section above, based on various past cases under the Policy involving the Respondent, together with the material on the present record, it is clear that the Respondent is a dealer in domain names, sometimes termed a "domainer". As the panel noted in *Fundación Trinidad Alfonso*

Mocholí, Fundación de la Comunitat Valenciana v. Jack Zhang, WIPO Case No. D2020-1543: “In the context of domainers, panels have generally assessed the issue of registration in bad faith objectively. In making that assessment, panels have given considerable weight to whether the respondent has registered the domain name in issue without regard to whether or not it would impinge on someone else’s trademark rights and without any apparent attempt to avoid doing so. In addition, panels have given weight to a finding that the domain name in question abuses the trademark rights of another person, such as the complainant in the proceeding and the likelihood that the value, or greatest value, of the domain name resides in that other person.”

Here, the disputed domain name is an exact match for the Complainant’s trademark, which is on first appearance a distinctive coined or made-up term. The Panel must accord this with an appropriate degree of weight. Nevertheless, the Respondent provides a plausible case in rebuttal of the Complainant’s assertion of bad faith registration, countering that the disputed domain name contains a short, brandable term which is not exclusive to the Complainant. The evidence indicates that some of such third parties hold registered trademarks and some do not. Some are using the term as a business name and others as a product name. It appears to the Panel that such parties all adopted the name “voxan” independently and for the same reason that it is said to have attracted the Respondent, namely that it is short, pronounceable, and brandable, despite the fact that it is apparently a meaningless term.

The thrust of the Respondent’s case is that this general appeal of the term “voxan” entitles it to acquire and offer the disputed domain name for sale to any interested party on the open market, provided that in so doing it is not targeting, and had no intent to target, the trademark rights of any person. Importantly, the Respondent asserts that it had no knowledge of the Complainant nor intent to target the Complainant’s rights when the disputed domain name was acquired. Two pieces of evidence are of particular significance here.

First, the Respondent produces an online article which states in terms that the Complainant is “almost totally unknown in the United States”. Such article also indicates that the Complainant’s VOXAN brand has been in and out of active use, in that it passed through a series of owners, one of whom was forced into liquidation, with the Complainant ultimately acquiring the brand in 2010. The reasonable inference which the Panel takes from all of this evidence, in the absence of countervailing evidence from the Complainant, is that unless *e.g.*, the Respondent were a serious motorcycle enthusiast or actively researched liquidated companies with a view to possible resurgence, it would have been unlikely to be aware of the Complainant or its rights in the VOXAN mark when the disputed domain name was acquired. There is no evidence before the Panel indicating that the Respondent has any such knowledge of the Complainant or its line of business.

Secondly, the Respondent shows that on the same date that it acquired the disputed domain name, it also acquired a very similar domain name, <visan.com>, from the same Registrar and presumably in the same auction process. Unless such acquisition was wholly pretextual, which seems unlikely to the Panel, this evidence is reasonably supportive of the notion that the Respondent was engaged in the practice of acquiring short, brandable names, which it believed to be of general appeal, and was not intentionally targeting the Complainant or its mark through the acquisition of the disputed domain name. A previous case under the Policy also found that the Respondent had engaged in similar activity, when it acquired the apparently meaningless yet pronounceable domain name <virgan.com>, which the panel held was not registered or used in bad faith in the circumstances of that case (see *Laboratoires Thea v. Tech Admin, Virtual Point Inc., supra*). In any event, in the specific circumstances of this case, the Panel considers that the weight of the evidence on the record does not favor the Complainant’s contentions.

The Respondent’s case might have been substantially displaced had the Complainant provided suitable evidence showing the strength of its association with the VOXAN mark and the international reach of its trademark via, for example, a prominent position online or the notoriety of its global activities in other respects. It is perfectly possible that among the various third parties using the term, the Complainant has by far the strongest association with the VOXAN mark on a worldwide basis. If so, the requisite degree of targeting might possibly have been inferred, provided that the evidence indicated that, to put matters into the wording of the panel in *Fundación Trinidad Alfonso Mocholí, Fundación de la Comunitat Valenciana v. Jack Zhang, supra*, “the value, or greatest value, of the disputed domain name resides in the Complainant”.

However, it is notable that there is a complete absence in the Complaint of any information about the extent or reach of the Complainant's mark, the manner in which it has been used or indeed its history or notoriety. The Complaint merely notes that the Complainant is specialized in the conception and commercialization of motorbikes and provides a list of registered trademarks. It says that it or its rights would have come to the attention of the Respondent by virtue of its "activities", which are not described in any greater detail. This is fatal to any case which the Complainant may have been seeking to make with regard to the alleged passive holding of the disputed domain name along the lines of *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. D2000-0003, in that there is no evidence that the Complainant's trademark has a strong reputation and is widely known. Furthermore, this lack of evidence means that the Panel is in fact entirely reliant on the article produced by the Respondent for any background information regarding the Complainant. Such article is supportive of the Respondent's case as to a probable lack of awareness of the Complainant's mark on the Respondent's part.

Based upon the Panel's finding that the Complainant has failed to prove any knowledge or targeting of its rights in the registration of the disputed domain name, it follows that the Respondent was thereafter entitled to use the disputed domain name including by offering it for sale. There is insufficient evidence on the record before the Panel to show that the Respondent was targeting any specific rights holder by way of that process. The Panel does note that the fact that the Respondent itself points out that the term has been used by third parties (and a relatively small number at that) in connection with a range of goods or services could arguably be construed as implying awareness of those users of the "voxan" term as a brand name, *i.e.*, that the Respondent had in mind any one of those entities as a sales target. That strikes the Panel as potentially running afoul of Policy paragraph 4(b)(i) but to successfully make such a claim would require more and stronger evidence than has been presented here.

The burden of proof in respect of registration and use in bad faith rests upon the Complainant. On the present record, the Panel is satisfied that the Complainant has not carried that burden. The Complaint accordingly fails.

F. Reverse Domain Name Hijacking

The Respondent has sought a finding of Reverse Domain Name Hijacking ("RDNH") in the present case.

Paragraph 15(e) of the Rules provides that, if "after considering the submissions the panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding". The UDRP Rules define RDNH as "using the UDRP in bad faith to attempt to deprive a registered domain-name holder of a domain name". Mere lack of success of the Complaint is not itself sufficient for such a finding. The Panel will review objectively the whole circumstances of the case, to determine whether the Complaint was brought in bad faith.

Upon an initial reading, it might appear that there were good grounds for the present Complaint. The Complainant is the proprietor of a global portfolio of VOXAN registered trademarks, this being a coined and apparently distinctive term rather than a dictionary word. There are signs that the Complainant's trademark was being targeted specifically by the disputed domain name, albeit that as will be discussed below, the Complainant failed to identify that those signs pre-dated the Respondent's acquisition. Finally, the disputed domain name was being offered for sale and a high price was being demanded by the Respondent, which appeared to be considerably in excess of its likely out of pocket costs. Had these been the only factors for the Panel to review in this section, it would probably have found that the Complaint was brought in good faith and declined the Respondent's request for a finding of RDNH.

It is however of some importance that the Complainant failed to note that the disputed domain name had changed hands at some point after it complained to the proprietor of the website to which the disputed domain name had been pointing. As far as the evidence on the present record is concerned, this fact would have been clear from a change to the Registrar's Whois record in May 2020, given that the Respondent's

historic Whois record dated May 5, 2020, the Registrar's verification response and the entry in the case file dated July 7, 2020 each plainly identify the Respondent's interest in the disputed domain name. Although it has not seen any corresponding evidence of prior Whois records, the Panel reasonably assumes that such interest could not have been shown on the Whois record prior to the Registrar's auction of the disputed domain name in which the Respondent was the successful bidder.

Instead of communicating with the Respondent to set out its trademark rights and to ascertain why the Respondent had registered the disputed domain name, the Complainant appointed an agent to negotiate the terms of purchase with it. That agent neither disclosed its principal's identity nor indicated that such principal was the proprietor of relevant trademark rights. This seems to be a case whereby the Complainant only launched the Complaint after unsuccessfully attempting to acquire the disputed domain name. That the Complainant might have been aware that its position was weak is suggested by the fact that, before abandoning negotiations, it made a final offer of the sum of USD 40,050 to purchase the disputed domain name.

Of perhaps the greatest importance in the assessment of RDNH in the present case are a series of misstatements made by the Complainant in the Complaint, which it knew or ought to have known were both incorrect and potentially material to the Panel's assessment on the merits. First, the Complainant notes the use of the disputed domain name in 2018 to forward to "www.motoshark.com" without qualification, despite the fact that such use pre-dates the Respondent's acquisition of the disputed domain name. This would have been evident from the Registrar Whois records as noted above, which the Complainant does not produce in evidence. Secondly, the Complainant asserts that following its communications with the operator of the website at "www.motoshark.com", it did not hear from the holder of the disputed domain name and that said holder's identity was only revealed after the Complaint was filed. This misleadingly suggests that the present Respondent had taken deliberate action to conceal its identity from the Whois record and had failed to communicate with the Complainant when contacted. In fact, it appears that the Complainant only contacted the Respondent via an agent in terms of the negotiation process discussed above and there has been no such concealment of the Respondent's interest in the disputed domain name.

Thirdly, the Complainant asserts that no contact email address was provided for the Respondent on the Whois record. As noted earlier, it appears from the Complainant's Annex 1 to the Complaint that the Complainant has considered only the registry Whois, which does not list such details. The historic Registrar Whois, as provided by the Respondent, does list the Respondent as registrant. It also provides a means of contacting the Respondent as is required by the ICANN Board's "Temporary Specification for gTLD Registration Data".² Finally, the Complainant states that when contacted by the Complainant, the Respondent "responded that he would not sell the disputed domain name under USD 290,000". This misrepresents the true position that the Respondent did not directly make any such statement and that the figure of USD 290,000 was put forward as a counter-offer in a back-and-forth negotiation process, which ultimately led to the Respondent seeking a far lower figure before negotiations collapsed.

Had all or indeed any of these statements been left unchecked, the Panel might have formed a different view of the Respondent and its motivations for the registration and use of the disputed domain name. Likewise, many of the Respondent's submissions would undoubtedly have been called into question. It is useful that the Response is before the Panel and, to a lesser extent, that the Panel itself noted the presence of the registry Whois record and identified the fact that the Registrar's Whois records do not bear out the Complainant's contentions, so that the true position is made clear. In short, there was a potential for the Panel to have been misled by the Complainant's statements.

In a written submissions procedure such as the UDRP, parties generally have a responsibility to ensure that their submissions are as accurate as possible. Indeed, in terms of paragraph 3(b)(viii) of the Rules, the complainant is required to certify *inter alia* that the information contained in the complaint is to the best of the complainant's knowledge complete and accurate. The Complainant's representative has so certified in this case. As has been observed by one panel member in a concurring opinion in *Religare Health Insurance*

² <https://www.icann.org/resources/pages/gtld-registration-data-specs-en/#temp-spec>

Company Limited v. Name Administration Inc. / Domain Administrator, WIPO Case No. D2019-2073, “That certification requires at least minimal due diligence into both the factual background justifying [or not] charges of illegitimate use and bad faith”. The Complainant here has failed to engage in sufficient due diligence and this has led it to bring a Complaint which, once the true facts emerged, had only limited foundation at least on the basis of the present record. In the Panel’s opinion, this, too, points in the direction of a finding of RDNH.

In all of these circumstances, the Panel finds that the Complaint was brought in bad faith in an attempt at Reverse Domain Name Hijacking and constitutes an abuse of the administrative proceeding.

7. Decision

For the foregoing reasons, the Complaint is denied.

/Andrew D. S. Lothian/

Andrew D. S. Lothian

Sole Panelist

Date: August 20, 2020