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ARBITRATION AWARD

.IN REGISTRY

(C/O NATIONAL INTERNET EXCHANGE OF India)

Before the Sole Arbitrator, Binny Kalra

Disputed domain name <WWW.LOTUS.IN>

In the matter of:

INDRP Case No: 1519

Lotus Herbals Pvt. Ltd.

vs

Weisheng Zheng

Complainant

Respondent

Binny Kalra

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ARBITRATION AWARD

.IN REGISTRY

(C/O NATIONAL INTERNET EXCHANGE OF India)

Before the Sole Arbitrator, Binny Kalra

Disputed domain name <**LOTUS.IN**>

In the matter of:

LOTUS HERBALS PVT. LTD.

No.2 Forest lane, Near Ghitorni Metro,

Station Sultanpur, M.G Road,

New Delhi-110030, India

Through its Authorized Signatory

Complainant

v

Weisheng Zheng

LG, SZ, GD 518000

China

Respondent

INDRP Case No: 1519

1. The Parties:

The Complainant is a company registered under the Indian Companies Act, 1956, who is represented in these proceedings by Mr. Vikrant Rana, c/o S.S. Rana & Co., Advocates, No. 317, Lawyers' Chambers, Delhi High Court, New Delhi 110003. The Respondent is Weisheng Zheng, who appears to be an individual with the indecipherable address "LG, SZ, GD 518000, China".

2. The domain name, Registrar, and Policy:

The subject matter of the complaint is the domain name < lotus.in > (hereinafter



referred to as the "**Disputed Domain Name**"). The Registrar for the Disputed Domain Name is GoDaddy.com, LLC. The present arbitration is being conducted in accordance with the Arbitration and Conciliation Act, 1996, the .IN Domain Name Dispute Resolution Policy ("**Policy**") and the INDRP Rules of Procedure ("**Rules**").

3. Procedural history:

5 March 2022: Statement of acceptance along with a declaration of impartiality and independence was sent by the arbitrator to the .IN Registry

7 March 2022: The .IN Registry transmitted information of appointment of the arbitrator and circulated the complaint and its annexures to the parties

7 March 2022: NIXI informed the Panel that "email pertaining to the domain complaint and soft files of it were sent to all concerned parties including the Respondent on his email given in the WHOIS details. The said email from Respondent has bounced back which is given in trail mail below." The delivery failure message was the following:

----- Forwarded Message -----

From: MAILER-DAEMON@esahydvagw03.nic.in
To: "Legal NIXI" <legal@nixi.in>
Sent: Monday, March 7, 2022 5:40:46 PM
Subject: Delivery Status Notification (Failure)

The following message to <214114@qq.com> was undeliverable.

The reason for the problem:

5.4.7 - Delivery expired (message too old) 'timeout'

10 March 2022 to 22 March 2022: Emails from NIXI with attachments were unexpectedly blocked by the firewall in the central server in the panel's office and were released after the IT team was notified and the issue was rectified.



24 March 2022: The panel took note of the delivery failure report on the Respondent's given email address 214114@qq.com. Service on the Respondent was deemed to be complete in accordance with INDRP Rule 2 (d) (iii) and the Respondent was proceeded against in default. The award was reserved.

4. Complainant's case:

The Complainant's (which term includes its predecessor(s)-in-interest, subsidiary companies, licensees, franchisees, sub-franchisees, distributors, associates and affiliates and group companies) case, including claims and contentions as to its business and rights in the trademark LOTUS, are encapsulated below:

1. The Complainant was incorporated in India on September 20, 1993. It changed its name to **LOTUS HERBALS PRIVATE LIMITED** on September 18, 2014. An extract of the Company Master Data as available on the website for the Ministry of Corporate Affairs is filed as **Annexure C-3**.
2. It is engaged in production and manufacture over 250 skin care, hair care and make-up products under the name **LOTUS** and variations thereof. Its business is around 30 years old. It has developed its products with research and a combination of science, technology and ancient texts, and become the most trusted manufacturer and marketer of herbal and natural cosmetic products.
3. The mark "**LOTUS**" was adopted by the complainant as a company name, trade name as well as a trade mark at least since the year 1993.
4. The Complainant has registered the top-level domain name www.lotusherbals.com as of April 20, 1998 and operates an interactive e-commerce website at this domain. The said website is accessible globally and showcases information about the Complainant's history and products



under the trade mark **LOTUS** and variations thereof.

5. The Complainant has obtained its earliest registrations under Nos. 711932 and 711934 dated August 2, 1996, in classes 3 and 5 respectively, for inter alia cosmetic and medical preparations. The trade mark LOTUS Herbals in these registrations is represented in a label form as shown below:



In addition, the Complainant has set out a list of its trademark registrations for the mark LOTUS and LOTUS with various suffixes, in para 4 of the complaint. Copies of some registration certificates are at **Annexure C-6**.

6. The Complainant has provided its annual sales revenue figures from the year 1998-1999 up to 2019-2020 in para 8 of the complaint. It also claims to have spent crores of Rupees for promoting its trade marks by means of national and trans-national advertising. The advertisement and promotion expenses for the same period are set out in para 9 of the complaint.
7. Paras 10 to 17 of the complaint elaborate on the efforts made by the Complainant to promote and market its products, their availability on several e-commerce platforms, the use of the trademark and the popularity of the products under the mark LOTUS and variations of the LOTUS brand. The Complainant claims that the marks LOTUS and variations thereof have become distinctive and well-known and have enjoyed distinctiveness, goodwill and reputation long prior to the date on which the Respondent registered the disputed domain name.
8. The Complainant contends that the disputed domain name < lotus.in > is phonetically, visually, conceptually identical to its trade mark LOTUS, domain name www.lotusherbals.com and also its corporate name Lotus

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Herbals Pvt Ltd. Whois data shows that the disputed domain name was created on February 16, 2005 while the "Registrant Create Date" is April 15, 2017.

5. Respondent's case:

The Respondent has not made any representation in this matter.

6. Legal grounds:

The Complainant submits that it has established the three legal grounds that are required by the .IN Domain Name Dispute Resolution Policy, namely:

- I. The domain <LOTUS.IN> is identical and/or confusingly similar to the Complainant's trade mark LOTUS in which the Complainant has rights (Paragraph 4(a) of the .IN Policy). Reliance is placed on a prior decision in M/s Retail Royalty Company v. Mr. Folk Brook INDRP/705 wherein transfer of the disputed domain name <americaneagle.co.in> was ordered on the basis of the complainant's registered trademark and domain name "AMERICAN EAGLE" that was created by the complainant much before the date of creation of the disputed domain name;
- II. The Respondent has no rights or legitimate interests in respect of the domain name (Paragraph 4(b) and Paragraph 6 of the .IN Policy). Reliance is placed on a prior decision in Career Builder, LLC v. Stephen Baker, Case No. D2005-0251; and
- III. The domain name was registered or is being used in bad faith (Paragraph 4(c) and Paragraph 7 of the .IN Policy). Reliance is placed on a prior decision in Instagram, LLC v. Contact Privacy Inc./ Sercan Lider (WIPO Case No. D2019-0419) wherein it was held that "passive holding can be sufficient to find bad faith". The Complainant has also relied on the decision in the case of *Telstra Corporation Limited v. Nuclear Marshmallows* (WIPO



Case No. D2000-0003), which explains when “passive holding” can be a determinant of bad faith. The extracts are self-explanatory:

“...In particular it seems that the fifth element (i.e., impossibility to conceive of any plausible active use) is actually a conclusion which was made on the base of the preceding four elements and that this fifth element plays a decisive role in determining whether any particular passive holding can be regarded as a "bad faith" use of a domain name in dispute.

In the present case like in the above cited case, the Panel cannot conceive of any plausible use of the disputed domain name that would be legitimate, absent an authorization from the Complainant. As the disputed domain name is strictly identical to the Complainant's distinctive mark, consumers would certainly mistakenly assume that an active website connected to the disputed domain name is operated or endorsed by the Complainant, when such is not the case.

The Panel accordingly reaches the conclusion that the passive holding of the disputed domain name amounts to use in bad faith given the circumstances of the case.”

7. Discussion and findings:

The Panel has seen the complaint and annexures and sets out its observations and conclusions below.

A. Whether the Disputed Domain Name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights

The Panel accepts that the Complainant is the owner of the mark / name LOTUS for skin care, hair care and make-up products. It has a corporate name, domain



name, and trademarks, of which LOTUS is an essential feature. The Complainant also owns several registrations comprising variations combinations and permutations of the LOTUS with other words. Several of the Complainant's registered marks predate the registration of the disputed domain name. **Annexure C-10** shows that the Complainant has social media accounts titled @lotusherbals on Facebook and lotus_herbals on Instagram, with several hundreds of thousands of followers. The disputed domain name < **lotus.in** > is identical to several of the Complainant's trademarks and has the potential to cause confusion and harm the Complainant's legal rights.

B. Whether the Respondent has any rights or legitimate interests in respect of the Disputed Domain Name

The Complainant's contention set out in para 33, is "that it is not possible to conceive of any plausible use of the domain name <LOTUS.IN> by Respondent that would not be illegitimate, as it would inevitably create a false association and affiliation with Complainant and its well-known trade mark LOTUS. Therefore, it is submitted that Respondent has no rights or legitimate interests in respect of the impugned domain name."

The Panel finds it difficult to agree with this contention because of its overbroad nature. The word 'lotus' is a common dictionary word and denotes the name of a flower that is very familiar, at least to the Indian population, for a variety of reasons, and the use of which can be seen in respect of a host of goods and services. The Complainant has also conceded in para 33, as it must, that it "has derived the name/ mark LOTUS in respect of its goods and services from the Lotus flower."

In the Panel's opinion the nature of the word 'lotus' is such that it cannot be said to be exclusively associated with the Complainant across the board for all and any type of products or services, however the Complainant has exclusive rights for the goods and services covered by its registrations.

The Panel notes the Complainant's contention in para 34, namely:



“Additionally, the fact that the Respondent is currently not using the domain for any purpose and no content is being hosted therein, gives the impression that it is a case of passive holding and the same is tantamount to the fact that the Respondent does not hold any legitimate interest in the domain name. Reliance is placed on this panel's decision in Flipkart Online Services Private Limited v. Azeem Ahmed Khan wherein it was held that "parking of domain names incorporating someone else's trademark constitutes bad faith...”

The Panel accepts that the passive holding of the disputed domain name by the Respondent may be an indicator of the lack of its legitimate interest therein, especially if the disputed domain name has never been used in a bona fide commercial sense at any point of time ever since its registration by the Respondent, and the same is being held merely to sell it to the highest bidder. However, in view of the earlier observations by the Panel, it is clear that the decision in *Telstra* is not applicable to the facts of this case.

C. Whether the Disputed Domain Name has been registered or is being used in bad faith

The Complainant states in para 33 of the complaint:

“Furthermore, the fact that the Complainant has derived the name/ mark LOTUS in respect of its goods and services from the Lotus flower further aggravates the Respondent's bad faith, in as much as, the Respondent is using the identical word with respect to the impugned domain name <LOTUS.IN>. There can be no other plausible explanation as to how the Respondent arrived at the impugned domain name <LOTUS.IN> which incorporates the Complainant's mark LOTUS in toto.”

The Panel is not persuaded by the above statement, which in fact suggests contradictorily that the Respondent could have derived the disputed domain name from the same source as the Complainant. Accordingly, the cited decision in *M/s Merck KGaA v Zeng Wei; INDRP/323* does not appear applicable to the facts of this dispute.



The disputed domain name is admittedly not in use by the Respondent and at this stage there is no material on record to determine if its future use, if any, by the Respondent would cause confusion such that the Complainant would suffer. However, the Panel accepts that use of the disputed domain name has the potential to create a false association and affiliation with the Complainant and its goods.

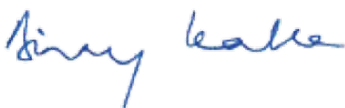
Since the Complainant has taken the initiative to file the present complaint under the INDRP and shown demonstrable legal rights in the name / mark LOTUS for specific goods and services, and the Respondent appears to have registered the disputed domain name based on incomplete, false or incorrect information, so much so that its email address has turned out to be inadequate for service of the complaint by NIXI, and that the disputed domain name is available for sale for a sum of US \$28,888 through a third party seller as of the date of the award, the Panel accepts the Complainant's contention that the disputed domain name has been registered in bad faith.

Considering the totality of the factors as discussed in this section, the Panel finds that the Complainant has established the grounds for transfer of the disputed domain name.

Decision:

Accordingly, the Panel directs that the disputed domain name <WWW.LOTUS.IN> be transferred to the Complainant.

Signed:



(Binny Kalra)

Arbitrator

Date: 9 April 2022