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BEFORE ALOK KUMAR JAIN, SOLE ARBITRATOR
INDRP Case No. 1467

Disputed Domain Name: <LOTUSHERBALS.IN>

ARBITRATION AWARD

LOTUS HERBALS PVT.LTD,

Complainant

Versus

Vedic Marketing LLC,

Respondent

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BEFORE ALOK KUMAR JAIN, SOLE ARBITRATOR

.IN REGISTRY

NATIONAL INTERNET EXCHANGE OF INDIA(NIXI)

INDRP ARBITRATION

INDRP Case No. 1467

Disputed Domain Name: <LOTUSHERBALS.IN>

ARBITRATION AWARD

Dated 25 .12.2021

IN THE MATTER OF:

LOTUS HERBALS PVT. LTD.

No.2 Forest lane, Near Ghitomi Metro,

Station Sultanpur, M.G Road,

New Delhi-110030, India

Through its Authorized Signatory

Complainant

Versus

Vedic Marketing LLC

1302 Ashford Ave, PH-1,

San Juan, 00907

Puerto Rico

Ph: (+1).4083849699

Email: info@vedicmarketing.ij~i

Respondent

1. The Parties

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1.1 The Complainant in this arbitration proceeding is LOTUS HERBALS PVT.LTD., a company organized and existing under the laws of India having address at No.2, Forest lane near Ghirtorni Metro ,Station Sultanpur, MG Road New Delhi-110030, India. The Complainant is represented by Vikrant Rana , S.S. Rana & Co., Advocates, Registered office at 317, Lawyers Chambers, High Court of Delhi, New Delhi-110003, India. Phone: +91 11 4012300, Fax: +91 11 40123010, Email: inf@ssrana.com

1.2 The Respondent is Vedic Marketing LLC' of the address '1302 Ashford Ave, PH-1, San Juan, 00907, Puerto Rico'. The disputed domain name is registered in the name of Respondent.

2 Domain Name and Registrar:-

2.1 The Disputed Domain name is <www.LOTUS HERBALS.IN> bearing Registry Domain ID: DE9A00FDEC2964CE3B77E1575D18C04C3-IN which was registered on 18 September 2020

2.2 The accredited Registrar with whom the Disputed Domain Name is registered is GoDaddy.com, LLC

3 Procedure History:

3.1. This arbitration proceeding is in accordance with the .IN Domain Name Dispute Resolution Policy (the "Policy") adopted by the National Internet Exchange of India ("NIXI") and the INDRP Rules of Procedure (the "Rules") which were

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approved in accordance with the Indian Arbitration and Conciliation Act, 1996. By registering the Disputed Domain Name with a NIXI accredited Registrar, the Respondent agreed to the resolution of disputes pursuant to the said Policy and the Rules.

As per the information received from NIXI, the history of the proceedings is as follows:

- 3.2. The Complaint was filed by the Complainant with NIXI against the Respondent . On 9.12.2021 I was appointed as Sole Arbitrator to decide the disputes between the parties. I submitted statement of Acceptance and Declaration of Impartiality and Independence same day as required by rules to ensure compliance with Paragraph 6 of the Rules.

NIXI notified the Parties of my appointment as Arbitrator via email dated 9.12.2021 and served by email an electronic Copy of the Complainant with Annexures on the Respondent at the email addresses of the Respondent.

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3.3. I issued notice to the parties vide email dated 9.12.2021 directing the Complainant to serve complete set of Complaint on the Respondent in soft copies as well as in physical via courier /Post. The Respondent was directed to file its response within 7 days from the date of notice. No response was received from the Respondent till 16.12.2021. Therefore, on 17.12.2021, I granted further time to Respondent directing the Respondent to file response within 5 days failing which the matter shall be decided on merit. The extra time of 5 Days given to the Respondent expired on 22.12.2021. Respondent did not file any reply till 22.12.2021 or thereafter and till date. Accordingly now the complaint shall be decided on merit. No personal hearing was requested by any parties.

3.4 A Complete set of Complaint was served by NIXI in electronic form by email to the Respondent on 9.12.2021 at the email provided by the Respondent with WHOIS, while informing the parties about my appointment as Arbitrator. . All communications were sent to Complainant, Respondent

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and NIXI by email. Therefore I hold that there is sufficient service on the Respondent through email as per INDRP rules. The Respondent has not filed any response to the Complaint despite two opportunities.

3.5. Clause 8(b) of the INDRP Rules requires that the Arbitrator shall at all times treat the Parties with equality and provide each one of them with a fair opportunity to present their case.

3.6. Clause 12 of INDRP Rules provides that in event any party breaches the provisions of INDRP rules and/or directions of the Arbitrator, the matter can be decided ex-parte by the Arbitrator and such arbitral award shall be binding in accordance to law.

3.7 As stated above, Initially I gave 7 days time to the Respondent to file a Response and additional 5 days time to file response, but the Respondent failed to file any Response to the Complaint despite opportunities and chose not to answer the Complainant's assertions or controvert the Complaint and the contentions raised. As a result, I find that the Respondent has

been given a fair opportunity to present his case but has chosen not to come forward and defend itself.

- 3.8 Further Clause 13(a) of the Rules provides that an Arbitrator shall decide a Complaint on the basis of the pleadings submitted and in accordance with the Arbitration & Conciliation Act, 1996 amended as per the Arbitration and Conciliation (Amendment) Act, 2015 read with the Arbitration & Conciliation Rules, Dispute Resolution Policy, the Rules of Procedure and any by-laws, and guidelines and any law that the Arbitrator deems to be applicable, as amended from time to time.

In these circumstances the Tribunal proceeds to decide the complaint on merit in accordance with said Act, Policy and Rules on Respondent's failure to submit a response despite having been given sufficient opportunity and time to do so.

4. Grounds for Arbitration Proceedings.

INDRP Policy para 4. Class of Disputes provides as under:

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Any Person who considers that a registered domain name conflicts with his/her legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

- (a) the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights; and
- (b) the Registrant has no rights or legitimate interests in respect of the domain name; and
- (c) the Registrant's domain name has been registered or is being used in bad faith.

5. The Case of the Complainant :-

The Complainant has stated in the complaint that as the Disputed domain name is phonetically, visually, conceptually identical to the Complainant's trade mark LOTUS HERBALS, domain name www.lotusherbals.com and also its corporate name Lotus Herbals Pvt Ltd, the Complainant is constrained to file the present complaint, in order to safeguard its valuable Intellectual Property rights in accordance with .IN

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Domain Name Dispute Resolution Policy.

- 5.1. Complainant has stated in the complaint that **Lotus Herbals** was founded in 1993 with the sole objective of providing best and natural beauty solutions to everyone including Indian skin tones. In the 30 years of beautifying consumers, **Lotus Herbals** has become the most trusted manufacturer and marketer of herbal and natural cosmetic products. Many of **Lotus Herbals** products are based on 5000 years old science of Ayurveda. Each product is hand crafted after a lot of research, with the aim to provide something better, more natural, eco conscious and sustainable for a market not defined by sex, age or ethnicity. The Complainant's products cater to all skin types and are intuitive, solution oriented and inclusive of all Indian skin types and shades. It is stated that the Complainant was incorporated under the name **LOTUS HERBALS LIMITED** in India on September 20, 1993 and the mark "LOTUS HERBALS" was adopted by it as a company name, trade name as well as a trade mark for its goods/ services at least as early as the year 1993. The Complainant changed its name to **LOTUS HERBALS PRIVATE LIMITED** (hereinafter also referred to as "**Lotus Herbals**") on September 18, 2014. Snapshot of the Company Master Data Page as available on the website for the Ministry of Corporate Affairs is as Annexure C-3 with the Complaint. It is further stated that the Complainant has registered the top level domain name www.lotusherbals.com

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from where they are operating an interactive e-commerce website. The said website showcases information about **Lotus Herbals'** history, endorsements as well as their products under the trade mark **LOTUS HERBALS** and variations thereof. The said website is accessible globally and can be viewed by persons all. The Complainant registered the domain **LOTUSHERBALS.COM** as far back as **April 20, 1998**. Snapshot of the WHOIS results of **LOTUSHERBALS.COM** is annexed with the Complaint as Annexure C-4.

It is further averred that the Complainant has also applied for and obtained registration for the trade mark **LOTUS HERBALS** vide Indian Registration Nos. 711932 and 711934 dated **August 02, 1996** for inter alia cosmetic and medical preparations in classes 3 and 5. And that the said registrations have been filed claiming use since **April 01, 1993**. Copy of the relevant extract from the Trade Marks Registry, India is annexed with the Complaint as **Annexure C-5 (colly)**. Thereafter, the Complainant obtained registrations over its trade mark **LOTUSHERBALS** and variations thereof including **LOTUS, LOTUS HERBALS, LOTUS PROFESSIONAL, LOTUS BEAUTY SALON** Etc in several classes. A list of some of the Complainant's trademark registrations incorporating the mark **LOTUS HERBALS** and variations thereof in India has been annexed with the Complaint as Annexure C-6(Colly)

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5.2. The Complainant further submitted that the Complainant's goodwill and reputation in the trade mark LOTUS HERBALS and variations thereof, have not come from sales alone. Crores of Rupees have been spent till now for promoting its trade marks by means of national and trans-national advertising details whereof have been given in para no.9 of the complaint. Details of annual turnover are given para no.8 of the Complaint.

Complainant further submits that the Complainant sells/offers for sale goods/ services bearing the name/ mark LOTUS HERBALS to consumers through various channels of distribution including via authorized dealers in brick and mortar stores, and via its own website at www.lotusherbals.com and popular third party e-commerce websites such as Amazon, Nykaa, Myntra, etc. Printouts from various stores/ e-commerce portals showing the Complainant's products bearing the mark LOTUS HERBALS are annexed with the complaint as Annexure -8 (colly). The Complainant and its products under the brand LOTUS HERBALS have been bestowed with numerous awards and recognitions and has also secured a significant place in the industry since long. Details of such awards are given in para no.14 of the Complaint. It is further stated that Lotus Herbals considers its name and trade marks LOTUS HERBALS and its variations as its valuable intellectual property and makes every effort to protect the same.

6.

Discussions and findings:

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The Complainant has invoked Clause 4 of the Policy to initiate the Arbitration Proceeding.

Clause 4 of the INDRP Policy provides as under:

4. Class of disputes:

Any Person who considers that a registered domain name conflicts with his/her legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

- (a) the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights; and
- (b) the Registrant has no rights or legitimate interests in respect of the domain name; and
- (c) the Registrant's domain name has been registered or is being used in bad faith.

Therefore in order to succeed in the Complaint, the Complainant has to satisfy inter alia all the three conditions provided in clauses 4(a), 4(b) and 4(c) quoted above.

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6.1 Condition 4(a):) the Registrant's domain name is identical and/or confusingly similar to a name, trademark or service mark in which the Complainant has rights;

6.1.1 I have gone through the complaint and perused all the documents annexed with the Complaint.

As per averments made in the Complaint, the Complainant is the proprietor of the trademark LOTUS HERBALS and has been continuously and exclusively using the same in relation to their business since at least as early as 1993, i.e. almost 30 years prior to the date on which the Respondent registered the domain <LOTUSERBALS.IN>. By virtue of long standing use and registration, the Complainant's trademark LOTUS HERBALS qualifies to be a well-known mark. The impugned domain name <LOTUSERBALS.IN> comprises of the Complainant's trade mark LOTUS HERBALS in toto. Therefore, the domain name <LOTUSERBALS.IN> is visually, phonetically, conceptually, deceptively and confusingly identical/ similar to Complainant's corporate and trade name LOTUS HERBALS PVT

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LTD, trade mark LOTUS HERBALS and the Complainant's domain <LOTUSERBALS.COM>.

It is further stated in the complaint that given the identity of the impugned domain name <LOTUSERBALS.IN> with the Complainant's name and mark LOTUS HERBALS, the same is bound to cause confusion and deception in the minds of the public that Respondent has some connection, association or affiliation with Complainant, when it is not so. And that It has been held by prior panels deciding under the INDRP that there is confusing similarity where the disputed domain name wholly incorporates the Complainant's trade mark such as *Kenneth Cole Productions v. Viswas Infomedia INDRP/093*. Further, a TLD/ccTLD such as ".in " is an essential part of domain name. Therefore, it cannot be said to distinguish the Respondent's domain name <LOTUSERBALS.IN> from the Complainant's trademark LOTUS HERBALS. This has been held by prior panels in numerous cases, for instance in *Dell Inc. v. Mani, Soniya INDRP/753*. Reliance is also placed on a prior decision in *M/s Retail Royalty Company v. Mr. Folk*

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Brook INDRP/705 wherein on the basis of the Complainant's registered trademark and domain names for "AMERICAN EAGLE", having been created by the Complainant much before the date of creation of the disputed domain name <americaneagle.co.in> by the Respondent, it was held that,

"The disputed domain name is very much similar to the name and trademark of the Complainant. The Hon 'ble Supreme Court of India has recently held that the domain name has become a business identifier. A domain name helps identify the subject of trade or service that an entity seeks to provide to its potential customers. Further that there is a strong likelihood that a web browser looking for AMERICAN EAGLE products in India or elsewhere would mistake the disputed domain name as of the Complainant. "

That the Complainant has acquired rights in the trade mark **LOTUS HERBALS** by way of trademark registrations, and by virtue of use as part of their company and domain names since much prior to the date on which the Respondent created the impugned domain <**LOTUSHERBALS.IN**> incorporating the Complainant's identical company name, trade mark and trade

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name **LOTUS HERBALS** in toto. This evident identity between the Respondent's domain name and the Complainant's marks, domain names and company name incorporating **LOTUS HERBALS** is likely to mislead, confuse and deceive the Complainant's customers as well as the general public as to the source, sponsorship, affiliation or endorsement of the Respondent's domain name. It is further stated that the Complainant's rights over the marks **LOTUS HERBALS** predate the Respondent's registration of the impugned domain <**LOTUSHERBALS.IN**> by almost 30 years, which as per the WHOIS records, was only registered/created on **September 18, 2020**. The identity between the Complainant's mark **LOTUS HERBALS** and the domain <**LOTUSHERBALS.IN**> is grossly exacerbated by the fact that the Respondent is using the domain for a parked page **displaying links to skincare/cosmetic products**, which are the primary products in relation to which the Complainant uses the mark **LOTUS HERBALS** and variants thereof.

The Respondent has not filed any response to the complaint as such all the averments of the complainant has remained un rebutted.

It is evident from above submissions and documents annexed with the complaint that the complainant has sufficiently

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established its rights in and to the ownership of the LOTUS HERBALS Trademarks.

A mere perusal of the disputed domain name 'LOTUSHERBALS.IN' of the Registrant/Respondent shows that the Respondent has used the Complainant's trading mark 'LOTUSHERBALS' in its entirety. it is well established that the mere addition of the Country Code Top Level Domain '.in' does not add any distinctive or distinguishing element.

In view of the above facts and submissions of the complainant, and on perusal of the documents annexed with the Complaint, I hold that the Disputed Domain Name <LOTUSHERBALS.IN> of the Registrant is identical to the trademark LOTUSHERBLS of the Complainant and the domain name www.LOTUSHERBALS.COM as well as substantially identical to the trademark LOTUSHERBALS and the corresponding trading name containing LOTUSHERBALS and the domain name www.LOTUSHERBALS.COM of the Complainant.

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6.2 Condition no.4 (b) the Registrant has no rights or legitimate interests in respect of the domain name;

The Complainant stated in the complaint that the Respondent has no legitimate interest in the domain name <LOTUSERBALS.IN>. It is further stated that the Complainant has not authorized the Respondent at any point of time to register the impugned domain name. Further, the Respondent cannot assert that it is using the domain name in connection with a *bona fide offering of goods and services* in accordance with Paragraph 6(a) of the .IN Policy, as it is not operating any website from the impugned domain and is instead using the domain in connection with a parked page hosting commercial/ sponsored links displaying links to skincare/ cosmetic products, which are the primary products in relation to which the Complainant uses the mark LOTUS HERBALS and variants thereof. Such links cannot constitute a bona fide offering of goods and services. Reliance is placed on Case No.JNDRP/ 481 *L'oreal v. Yerec International Limited*. Complainant stated in the complaint that the

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Respondent is not commonly known by the name LOTUS HERBALS within the meaning of Paragraph 6(b) of the Policy nor does it appear to have been known as much prior to the date on which Respondent registered the impugned domain name. Accordingly, Respondent is not making a legitimate, non-commercial fair use of the domain name. As per the relevant WHOIS records, Respondent in the present matter is known by the name **Vedic Marketing LLC**. Therefore, it appears that Respondent has deliberately chosen to use the domain name <LOTUSHERBALS.IN>, which is phonetically, visually, conceptually, deceptively and confusingly identical to Complainant's trademark, so as to suggest a direct connection or affiliation with Complainant's trademark LOTUS HERBALS and to create a direct affiliation with the Complainant and its business when in fact there is none. Thus the Respondent has no rights or legitimate interests in respect of the impugned domain name.

The Respondent has not filed any response as such the facts stated in the complaint had remained unrebutted. Further the

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Respondent has failed to satisfy the conditions contained in clause 6(a),(b) and 6(c) of INDRP Policy.

On the contrary the Complainant has established that the Registrant has no rights or legitimate interest in respect of the Disputed Domain Name and has never been identified with the Disputed Domain Name or any variation thereof. The Registrant's use of the Disputed Domain Name will inevitably create a false association and affiliation with Complainant and its well-known trade mark **LOTUS HERBALS**.

Therefore, in view of the submissions made in the complaint and on perusal of the accompanying documents, I am of the opinion that the Respondent has no rights or legitimate interests in respect of the domain name;

Accordingly I hold that the Registrant has no rights or legitimate interests in respect of the Disputed Domain Name.

6.3

Condition 4(C): the Registrant's domain name has been registered or is being used in bad faith

Clause 7 of INDRP Policy provides as under:

Clause 7. Evidence of Registration and use of Domain Name
in Bad Faith

For the purposes of Clause 4(c), the following circumstances, in particular but without limitation, if found by the Arbitrator to be present, shall be evidence of the registration and use of a domain name in bad faith:

(a) circumstances indicating that the Registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant, who bears the name or is the owner of the trademark or service mark, or to a competitor of that Complainant, for valuable consideration in excess of the Registrant's documented out-of-pocket costs directly related to the domain name; or

(b) the Registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Registrant has engaged in a pattern of such conduct; or

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(c) by using the domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.

Complainant stated that the fact that the mark **LOTUS HERBALS** is a unique combination of words and has been derived from the **Lotus** flower further aggravates the Respondent's bad faith, in as much as, the Respondent is using the identical combination with respect to the impugned domain name **<LOTUSERBALS.IN>**. There can be no other plausible explanation as to how the Respondent arrived at the impugned domain name **<LOTUSERBALS.IN>** which incorporates the Complainant's mark **LOTUS HERBALS** in toto and displays links to competing skin care/ cosmetics brands which are the primary products of the Complainant sold and marketed under the mark **LOTUS HERBALS**. In light of the continuous and

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exclusive use of the mark **LOTUS HERBALS** by the Complainant including as part of their trade/ corporate name over many years, this mark has no meaning other than as an identifier of the Complainant. Complainant has placed reliance on a decision of prior Panel in *M/s Merck KGaA v Zeng Wei INDRP/323* wherein it was stated that:

“The choice of the domain name does not appear to be a mere coincidence, hut a deliberate use of a well-recognized mark... such registration of a domain name, based on awareness of a trademark is indicative of bad faith registration. ”

The Respondent had no reason to adopt an identical name/ mark with respect to the impugned domain name except to create a deliberate and false impression in the minds of consumers that the Respondent is somehow associated with or endorsed by the Complainant, with the sole intention to ride on the massive goodwill and reputation associated with the Complainant and to unjustly gain enrichment from the same. Additionally, the fact that the Respondent is currently using the domain in relation to a parked page displaying advertisements/ links which redirect to

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skincare/ cosmetic brands of the Complainant's direct competitors, 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. Complainant has also placed reliance on earlier panel's decision in *Flipkart Online Services Private Limited v. Azeem Ahmed Khan* wherein it was held that *Sparking of domain names incorporating someone else's trademark constitutes bad faith*. Reliance is also placed on *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 use*". In another decision in *Johnson & Johnson v. Daniel Wistbacka (WIPO Case No. D2017-0709)* while discussing the elements constituting bad faith with respect to passive holding of respondent's domain name as noted in the landmark case of *Telstra Corporation Limited v. Nuclear Marshmallows (WIPO Case No. D2000-0003)*, it was held that, *...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*

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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. The facts and contentions enumerated in the complaint establish that Respondent's domain name registration for <LOTUSERBALS.IN> is clearly contrary to the provisions of paragraph 4(c) of the INDRP and is in bad faith.

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It is shown by the complainant that the Complainant is a well known reputed and global entity with extensive operations around the world since 1993. The Registrant was most certainly aware of the repute and goodwill of the Complainant. Therefore adoption of the substantially identical Disputed Domain Name by the Registrant in 2020 is with the sole intention to trade upon and derive unlawful benefits from the goodwill accruing to the Complainant. The Registrant has in fact knowingly adopted the Disputed Domain Name which wholly contains the Complainant's prior trademark LOTUSHERBALS to attract customers to the Disputed Domain Name by creating confusion with the Complainant's reputed trademark LOTUSHERBALS and corresponding domain name.

The bad faith of the Registrant is further evident from the fact that Using the Disputed Domain Name for displaying links for commercial gain is clearly in bad faith.

It is relevant to refer to following cases:

In Samsung Electronics Co. Ltd v. Vishal Didwania INDRP/141) wherein the rights of the complainant Samsung Electronics Co. Ltd. in the trading name and trademark

SAMSUNG were protected from the unlawful adoption of the domain name www.samsung.in and the disputed domain name was ordered to be transferred to the complainant.

Similarly in the case of PepsiCo .. Inc. v Mr. Wang S!nwnng (fNDRP/400) wherein the rights of PepsiCo .. Inc. in the reputed PEPSI marks were protected from the unlawful adoption of the domain name www.pepsi.in and the disputed domain name was ordered to be transferred to the Complainant.'

In view of above facts, submissions of the Complainant and on perusal of the documents annexed with the Complaint , I find that the Complaint has proved the circumstances referred in Clause 7(a)(b) and (c) of INDRP policy and has established that the registration of disputed domain name is in bad faith.

Accordingly I hold that the Registrant's Domain Name has been registered in bad faith.

7.

Decision

- 7.1. In view of the foregoing, I hold that the Disputed Domain Name is identical and or confusingly similar to the Complainant's well-known 'LOTUSERBALS'

Trademarks and that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name and that the Disputed Domain Name was registered in bad faith.

In accordance with the INDRP Policy and Rules, I direct that the Disputed Domain Name registration be transferred to the Complainant.

- 7.2. In the facts and circumstances, as discussed above, I deem it appropriate to order the Respondent to pay cost of Rs.50,000/- for present proceedings to the Complainant.

Delhi
Dated 25.12.2021

Alok Kumar Jain

Alok Kumar Jain
Sole Arbitrator