

Decision for dispute CAC-UDRP-101040

Case number	CAC-UDRP-101040
Time of filing	2015-08-18 11:31:22
Domain names	PROAIRDISCOUNTCARD.COM

Case administrator

Name	Lada Válková (Case admin)
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Complainant

Organization	TEVA RESPIRATORY, LLC
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Complainant representative

Organization	Matkowsky Law PC
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Respondent

Organization	Health Matrix Direct, Inc.
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OTHER LEGAL PROCEEDINGS

None

IDENTIFICATION OF RIGHTS

Trademark

Complainant provides evidence it owns U.S. Reg. No. 3,166,297, for the mark ProAir, registered on 31 October 2006, in Class 5, covering inhalers filled with pharmaceutical preparations for the treatment of respiratory disease.

FACTUAL BACKGROUND

FACTS ASSERTED BY THE COMPLAINANT AND NOT CONTESTED BY THE RESPONDENT:

Complainant is the U.S.-based respiratory division of Teva Pharmaceutical Industries Ltd., a leading global pharmaceutical company, committed to increasing access to high-quality healthcare by developing, producing and marketing affordable generic drugs as well as innovative and specialty pharmaceuticals and active pharmaceutical ingredients.

Complainant's ProAir® HFA Inhalation Aerosol is indicated in patients 4 years of age and older for the treatment or prevention of bronchospasm with reversible obstructive airway disease and for the prevention of exercise-induced bronchospasm. ProAir® HFA Inhalation Aerosol is the #1 dispensed quick-relief inhaler in the United States based on the number of prescriptions of

ProAir HFA (IMS National Rx Audit, September 2014). The ProAir® trademark is clearly well-known in the albuterol category in the United States. ProAir® HFA revenues amounted to \$ 1,448 million in 2014 (IMS National Sales Perspectives, for the year ending December 2014). Complainant's ProAir® RespiClick (albuterol sulfate) Inhalation Powder is indicated in patients 12 years of age and older for the treatment or prevention of bronchospasm with reversible obstructive airway disease and for the prevention of exercise-induced bronchospasm. It is the first and only FDA-approved multidose breath-activated rescue inhaler. More information on ProAir® is available in the United States via <ProAir.com> or <MyProAir.com>.

Complainant claims the disputed domain name is confusingly similar to Complainant's ProAir® registered trademark, in which Complainant has rights.

Rights and Legitimate Interest (Rules, 3(b)(ix)(2))

Complainant contends it has its own savings card and assistance program for those that meet the eligibility requirements and understand and agree to the terms and conditions associated therewith. Respondent Health Matrix Direct, Inc. has a website at healthmatrixdirect.com, and according to the company overview at Bloomberg Business, offers its own prescription discount and assistance programs. Respondent's offerings are not sponsored by, affiliated with, endorsed by, or otherwise connected in any way with Complainant's savings card for Proair, or its assistance program. Respondent has never been authorized, contracted, licensed or otherwise permitted by Complainant to use the Complainant's ProAir® trademark, nor is Respondent an authorized vender, supplier, or distributor of Complainant's ProAir®, and there is no relationship between itself and the Respondent. Respondent is also not commonly known by the trademark, as is evidenced by the Whois record.

The disputed domain name is hosted on NS1.Bluehost.com and NS2.Bluehost.com. As part of the Bluehost User Agreement, Bluehost provides Parked Page Services on domains hosted with Bluehost. This services is provided through Google's DomainPark program hosted by DoubleClick. This services presumably benefits the registrant through reduced hosting fees. Under the Bluehost.com user agreement, a user can opt out of the Parked Page Services at any time by simply replacing the default web page on the parked domain or pointing the DNS away from Bluehost.

Respondent failed to opt out of the Parked Page Service. As a result, ads for highly related products, including competitive products to Proair as well as unrelated commercial ads appear on the site aside the trademark PROAIRDISCOUNTCARD.COM, which incorporates the registered mark in its entirety and is substantially indistinguishable considering the other terms is a generic phrase related to Complainant's business. According to Complainant this type of website, which is merely an advertising portal and parking page that offers click-through opportunities to websites operated by Complainant's competitors generally does not constitute a bona fide offering of goods or services under the Policy.

Finally, Complainant concludes that none of the foregoing establishes rights or a legitimate interest in the disputed domain name, but rather constitutes unfair use, resulting in misleading diversion.

Registration and Use in Bad Faith (Rules, 3(b)(ix)(2))

Complainant claims that the disputed domain name has attracted viewers for commercial gain, by confusions within the meaning of paragraph 4(b)(iv) of the Policy because it generates revenue from click-through referrals.

The disputed domain name was registered on 29 March 2012.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the Domain Name is identical or confusingly similar to a trademark or service mark in which the complainant has rights (within the meaning of paragraph 4(a)(i) of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the Domain Name (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the Domain Name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

First condition

Complainant submits evidence it owns U.S. Reg. No. 3,166,297, for the mark ProAir.

The trademark is incorporated entirely in the domain name with the addition of “discountcard”.

The addition of merely generic wording to a trademark or of a hyphen in a domain name is insufficient in itself to avoid a finding of confusing similarity under the first element of the UDRP. E.g., CAC Case No. 100847 (transferring, i.a., <actiqcoupons.com>); Green Mountain Coffee Roasters, Inc. v. WhoisGuard, Inc. / Demetre Ellison, WIPO Case No. D2013-1683 (Nov. 21, 2013) (transferring <keurigcouponcodes.net>); Swarovski Aktiengesellschaft v. swarovski-coupon.net swarovski-coupon.net swarovski-coupon.net, WIPO Case No. D2013-1529) (transferring <swarovski-coupon.net>).

Therefore, the Panel finds the disputed domain is confusingly similar to a trademark in which Complainant has rights.

Second condition

A complainant is only required to make out a prima facie case that the respondent lacks rights or legitimate interests. In the absence of any response to the proceedings, the Panel may deduce that Respondent concedes it has no rights or legitimate interests in the disputed domain names.

Respondent Health Matrix Direct, Inc. has a website at healthmatrixdirect.com, and according to the company overview at Bloomberg Business, offers its own prescription discount and assistance programs.

However, Respondent’s offerings are not sponsored by, affiliated with, endorsed by, or otherwise connected in any way with Complainant’s savings card for Proair, or its assistance program. Complainant claims that Respondent has never been authorized, contracted, licensed or otherwise permitted by Complainant to use the Complainant’s ProAir® trademark, nor is Respondent an authorized vender, supplier, or distributor of Complainant’s ProAir®, and there is no relationship between itself and the Respondent.

Therefore, the Panel finds that Respondent has no rights or legitimate interests in respect of the disputed domain name.

Third condition

The domain name is hosted on NS1.Bluehost.com and NS2.Bluehost.com. As part of the Bluehost User Agreement, Bluehost provides Parked Page Services on domains hosted with Bluehost. This services is provided through Google’s DomainPark program hosted by DoubleClick. Under the Bluehost.com user agreement, a user can opt out of the Parked Page Services at any time by simply replacing the default web page on the parked domain or pointing the DNS away from Bluehost.

Respondent failed to opt out of the Parked Page Service. As a result, ads for highly related products, including competitive

products to Proair as well as unrelated commercial ads appear on the site aside the trademark PROAIRDISCOUNTCARD.COM, which incorporates the registered mark in its entirety and is substantially indistinguishable considering the other terms is a generic phrase related to Complainant's business.

This type of website, which is merely an advertising portal and parking page that offers click-through opportunities to websites operated by Complainant’s competitors generally does not generally constitute a bona fide offering of goods or services under the Policy and it may, together with other elements, also demonstrate bad faith registration and use. In this case, the website under proairdiscountcard - merely an advertising portal and parking page - undoubtedly take advantage of the Complainant's trademark. The disputed domain name has attracted viewers for commercial gain, by confusions within the meaning of paragraph 4(b)(iv) of the Policy because it generates revenue from click-through referrals.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

- 1. PROAIRDISCOUNTCARD.COM: Transferred

PANELLISTS

Name	Mr. Etienne Wéry
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DATE OF PANEL DECISION 2015-09-23

Publish the Decision