Decision for dispute CAC-UDRP-103423

Case number	CAC-UDRP-103423
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Domain names	cargotec.sucks

Case administrator

Organization	Iveta Špiclová (Czech Arbitration Court) (Case admin)

Complainant

Organization	Cargotec Oyj
Organization	Cargotec Patenter AB

Complainant representative

Organization	Berggren Oy

Respondent

Organization	Honey Salt ltd

Respondent representative

Organization	Orrick, Herrington & Sutcliffe LLP

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings which are pending or decided and which relate to the Disputed Domain Name.

IDENTIFICATION OF RIGHTS

The Complainant is the owner of registered marks for the word mark, CARGOTEC, in over 50 countries.

This includes the EUTM No. 004219961, filed on 28 December 2004 and registered on 8 June 2006, for classes 7, 12 and 37 and also EUTM No. 010006443, filed on 30 May 2011, registered on 11 October 2011 for classes 1, 2 and 4.

It filed an International application No. 850357, on 29 December 2004, registered on 21 July 2016 for classes 7,12 and 37 for various jurisdictions including AU, IS, JP, KR, NO, SG, TR, US, and BG, BY, CH, CN, CU, HR, IR, ME, MK, RO, RS, RU, UA and SG and US. Details of the status of those are provided at WIPO's websiteIt also has a US mark, No. 74059050, filed on 15 May 1990, registered on 19 January 1993.

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In common law jurisdictions, it may also enjoy rights arising from its use in trade.

FACTUAL BACKGROUND

The Complainant is a leading provider of various lifting, loading, and unloading machines, devices, and equipment for use for cargo and load handling purposes and services related to them.

The Complainant operates globally in more than 100 countries around the world.

The current Cargotec Corporation was established in 2005 from part of the KONE Corporation which demerged into two separate companies.

On the same day Cargotec Oyj was listed on the Helsinki Stock Exchange.

The name Cargotec is used by the Complainant also when referring to the group of its companies as a whole.

The Respondent registered the disputed domain name <cargotec.sucks> on 15 October 2020.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT:

Rights. The Disputed Domain Name incorporates Complainant’s company name and the Cargotec Trademark in its entirety and without modifications or additions. The addition of .sucks gTLD does not detract from the fact that the identical word CARGOTEC is entirely reproduced and the Disputed Domain Name is identical to the registered CARGOTEC trademark (WIPO Case No. 2013-0820, L’Oréal v Tina Smith, WIPO Case No. D2008-0820 Titoni AG v Runxin Wang and WIPO Case No. D2009-0877, Alstom v. Itete Peru S.A.). Further, according to UDRP panels, “a domain name that wholly incorporates a Complainant’s registered trademark may be sufficient to establish confusing similarity for purposes of the UDRP” (WIPO Case No. D2003-0888, Dr. Ing. h.c. F. Porsche AG v. Vasiliy Terkin). This is also evident in the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“The Overview”) where in section 1.13 it is stated that a domain name consisting of a trademark and a negative or pejorative term is considered confusingly similar to the complainant’s trademark for the purpose of satisfying standing under the first element. One of the given examples of such domain name is ”trademark.sucks”. Based on the above, it is clear that the Disputed Domain Name is identical to the Complainant’s prior trademark rights and the first requirement for UDRP proceedings is fulfilled. Furthermore, provided that the Disputed Domain Name is not deemed to be identical, contrary to the Complainant’s view, the Complainant submits that it is confusingly similar due to the incorporation of a distinctive Cargotec Trademark in its entirety. Therefore, there exists a high likelihood of confusion on the part of the public in the territories in which the trademark CARGOTEC is protected. The likelihood of confusion includes the likelihood of association with earlier trademark. For these reasons the Disputed Domain Name <Cargotec.sucks> is identical to the CARGOTEC trademarks, domain names and company name of the Complainant.

Under the paragraph 4(a)(ii) of the Policy, the complainant is required to make out a prima facie case that the respondent lacks rights or legitimate interests. Once such prima facie case is made, the burden of proof shifts to the respondent to come forward with appropriate allegations or evidence demonstrating rights or legitimate interests in the domain name. According to the searches conducted by the Complainant on the internet and in the trademark databases, Respondent does

not have any rights preceding those of the Complainant to the name “CARGOTEC” or to the Disputed Domain Name <cargotec.sucks>. The Respondent is neither affiliated with the Complainant nor authorized by it in any way to use the trademark CARGOTEC. The Complainant does not carry out any activity for, nor has any business with the Respondent. Given the Complainant’s extensive earlier trademark registrations, the Complainant has the exclusive prior rights to the “CARGOTEC” trademark. Further, Complainant wishes to note that the Respondent does not have right or legitimate interest based on protected speech. See WIPO Overview 3.0 and especially Case No. 103142 ”BIODERMA.SUCKS”. Based on the section 2.6 of the Overview, “the respondent’s criticism must be genuine and non-commercial” and that “in a number of UDRP decisions where a respondent argues that its domain name is being used for free speech purposes the panel has found this to be primarily a pretext for cybersquatting, commercial activity, or tarnishment”. Further at 2.6.2, it is stated that panels find that even a general right to legitimate criticism does not necessarily extend to registering or using a domain name identical to a trademark; even where such a domain name is used in relation to genuine non-commercial free speech, panels tend to find that this creates an impermissible risk of user confusion through impersonation.

The Disputed Domain Name leads to an internet page, as seen below on the screen capture. On the left column one can find several different links to internet sites with the names of different companies. Based on the Respondent’s domain registrations, and the fact that a privacy service by Privacy Hero Inc. is used, and the Registrar is the same in every registration, i. e. Rebel Ltd., the pages, which the links lead to, at least some pages seem to be maintained by the Respondent. Furthermore, the pages include similar comments and reviews as the internet page of the Disputed Domain Name. As the reviews are provided by third parties, the Respondent has no way of knowing anything of the genuineness of any criticisms made on the associated website. Based on the very general nature of the comments, it also seems obvious that the comments have been automatically generated or copied from other sources, and are not specific to Cargotec, as seen from the examples below: "Not good as much as whatever you expected. Work environment is not suitable for young. And no many chances to have various experiences. Salary is also very disappointed." "Colleagues wise is ok. Working environment and location is fine too. Management wise not so. Learning the job scopes and beyond. Own time own targetSalary and benefits wise." The disingenuous nature of the criticism is also obvious as at least some of the comments can be found identically elsewhere on the internet, as is the case for example with comments: “There is plenty of work to do, but the company cannot seem to hold on to office personnel within each state, therefore they hire temps to do the work. If office personnel were treated with respect and dignity by the office mgr. it would make for a more enjoyable work environment and the longevity of their employees. However office personnel is threated constantly that they will be fired (by the office mgr).” “Watched repairs done by mechanics and helped in repairs. Cleaned parts and the shop. Dropped off parts." “Not good as much as whatever you expected. Work environment is not suitable for young. And no many chances to have various experiences. Salary is also very disappointed.” “The company has good products There is a lot of scope of technical learning. However the employee facilities & perks are low. The HR policies are poor and job satisfaction level is low.” This blatant copying calls into question also the genuineness of the other comments and content on the website.

Further, the process by which the Disputed Domain Name was registered and the whole of content of the website seems to be automatically generated. In addition to the apparently copied comments, the company presentation is a direct quotation from Wikipedia as seen from the below screen capture. Also, the “Social Media” and “In The News” sections are automatically completed. The Respondent cannot base its right to or legitimate interest in the said criticism also because the comments and criticism are supposedly provided by third parties and thus the Respondent itself is not able to invoke rights of free speech/freedom of expression. The Respondent is the registrant of the Disputed Domain Name, not a person who may or may not have a genuine complaint regarding the Complainant. The Respondent has no knowledge of whether any such person using its site might be able to invoke such rights, nor is it in any position to engage in any balancing exercise with the trademark owner’s rights. Even assuming a third party generated the page on the Respondent’s website in order to engage in non-commercial criticism, rather than the Respondent itself, the Respondent immediately proceeds to exploit the position commercially by registering and offering the Disputed Domain Name for sale. The Respondent is an offshore company (Honey Salt ltd, based in Turks and Caicos Islands) doing business, among others, in registering ".sucks" domain names and selling them. The section 2.6.3 of the Overview notes that use may be fair if prima facie non-commercial, genuinely fair and not misleading or false, adding that incidental commercial activity e. g. fundraising may also be permitted. However, this does not apply here – the use is prima facie commercial, potentially furthering the ultimate commercial aims of the Respondent’s website, and it is definitely commercial in the sense of a proposed sale of the disputed domain name. There is also significant doubt as to the genuineness of the criticism. The assessment on rights and legitimate interests

should proceed in light of available evidence including the website at the Disputed Domain Name but is not a full assessment of the merits and demerits of the substantive criticism. The Complainant has not granted any license or other rights to use any of its trademarks or domains. The use and registration of the Disputed Domain Name has not been authorized by Cargotec and Cargotec does not approve of the use and registration of it. Given the above facts and as there are no business relations between the parties, Cargotec considers it to be evident that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name. Consequently, the Complainant submits that Clause 4.a (ii) of the Policy applies. Accordingly there are no rights or legitimate interests applicable. The Respondent has, considering all facts and circumstances described herein, registered the domain name with primary purpose of selling, renting, or otherwise transferring the domain name to the Complainant who is the owner of the CARGOTEC trademark. The purpose is highlighted by the fact that the domain name includes the pejorative word “sucks” which has highly negative connotation and the contents of the site seems obviously automatically generated. The website does not have any content which would justify its use, but instead targets the trademark owner with a purpose of selling the domain. The trademark owner is highly incentivized to buy the domain because of the negative effects the .sucks domain has on the brand especially considering the automatically generated/copied unsubstantiated negative claims. The use and registration of the Disputed Domain Name by the Respondent, considering the facts and circumstances of the registration and use of it and the prior rights held by Cargotec, has also been done with the intention to attract, for commercial gain, Internet users and trademark holders to the Respondents web site creating a likelihood of confusion with Cargotec’s CARGOTEC trademark. As stated in the section 3.1.4 of the Overview Panels have consistently found that the mere registration of a domain name that is identical or confusingly similar to a famous or widely-known trademark by an unaffiliated entity can by itself create a presumption of bad faith. The Respondent has no rights or legitimate interest in the Disputed Domain Name and has acted in bad faith by offering it for sale and further redirecting users to other similar websites, owned and offered for sale by the Respondent, through links provided on the <cargotec.sucks> website as shown below.

The Complainant operates globally in more than 100 countries around the world and has an extensive portfolio of trademarks protected in several countries / territories around the globe as well as several domain names. Therefore, and based on the content of the related website, at the time of registration of the disputed domain name, the Respondent was well aware of the Complainant’s famous and highly distinctive trademark and has intentionally registered one in order to benefit from the reputation of the Complainant’s trademark. The Respondent undeniably knew the identity of the Complainant and had intent to target its rights for commercial purposes before it registered the Disputed Domain Name. The Disputed Domain Name is not connected with genuine non-commercial criticism of the Complainant and the Respondent’s intention was to take unfair commercial advantage of the Complainant’s name and trademark while having no actual criticism or free speech of its own in which to engage. The Disputed Domain Name is used for a web page not containing genuine criticism content but only automatically generated content constituting further evidence of bad faith. The fact that the website contains links to similar websites for other companies and where the relevant domain names (to which the links point) are systematically put on sale by the Respondent is additional evidence of cybersquatting. For example, when clicking one of the links on the left column (step 1), e. g. “National Car Rental”, a website opens with a domain name of <everything.sucks>/National_Car_Rental and when clicking the link to “National Car Rental Sucks” on main page (yellow speech bubble, step 2), a page with a domain name <nationalcarrental.sucks>/National_Car_Rental opens (step 3). Such procedure can be repeated with other links, as well. The links under the title Popular Pages usually change when one enters the pages like <cargotec.sucks> after changing the session. Furthermore, according to Whois information, the Registrant Organisation is the same in these domain names.

As seen in the evidence, the Respondent has registered numerous .sucks domains further confirming the commercial purpose and bad faith related to the registration of <cargotec.sucks> domain. All of the above point to a systematic scheme, where the Respondent has a commercial purpose by registering the .sucks domain names and placing them for sale through other market places. Not only the automatically generated or retracted negative reviews and supposed opinions are harmful for the affected companies, but already the negative effect of the .sucks domains create a pressure to the companies to either react to the false use of such pages or even coerce into buying the .sucks domain name with their company name or trademark. As shown, the Respondent seems to follow a systematic procedure by registering .sucks pages with different company names, apparently generates reviews as if users would have had written their opinions on these pages giving the impression of free speech and opinions, whilst offering the domain names for sale elsewhere. Consequently, the Complainant submits that also Clause 4.a (iii) applies and accordingly it is evident that the disputed domain name was

registered and/or is being used in bad faith. With respect to the intention of Respondent, the intention should be determined by an objective test as stated in the case Paule Ka v. Paula Korenek (WIPO Case No. D2003-0453): “The proper test in this Panel’s view, is whether the objective consequences or effect of the Respondent’s conduct is a free-ride on the Complainant’s goodwill, whether or not that was the primary (subjective) intent of the Respondent.” This means that, even if it was not the Respondent’s original intention to cause harm to be done to Cargotec and Cargotec’s CARGOTEC trademark, the consequences of the Respondent’s actions have resulted in doing so and have prevented Cargotec from reflecting their trademark CARGOTEC in a corresponding domain name.

Furthermore, as is the case with other domain names, .sucks domain names corresponding to third-party trademarks cannot be freely registered regardless of their intent and purpose in so doing. The .sucks domain names are no exception in this regard and the possible exceptions are to be interpreted narrowly. The Respondent is intentionally trying to gain commercial profit from the use and registration of the Disputed Domain Name and is intentionally benefiting from the Complainant’s registered well-known brand and trademark CARGOTEC. Further, the Respondent is, by therefore mentioned actions, causing detriment and damage to the Complainant’s well-known brand and trademark CARGOTEC. Based on the above, and according to the paragraph 4. B (iv) of the Policy, the Disputed Domain Name should be considered as having been registered and used in bad faith by the Respondent.

RESPONDENT:

The Respondent registers domain names on the .sucks registry for the benefit of a non-profit, Everything.sucks, which provides an open forum for the public to discuss complaints about anything with which they might find fault. Complainant objects to the registration of the domain <cargotec.sucks> (“Disputed Domain Name”), which links to a page discussing criticism of the Complainant. But Complainant makes no coherent arguments how consumers might actually be confused by a domain name that, by its terms, announce itself as a gripe-site unaffiliated with Complainant. Nor does Complainant explain how Respondent does not have a legitimate interest in maintaining such a site—an undertaking that has been repeatedly recognized as legitimate and proper. Finally, Complainant offers no explanation how Respondent has registered the Disputed Domain Name in bad faith when one of the primary purposes for which ICANN approved the .sucks registry was to allow domains to be registered for the purposes of criticism and comment. In short, Complainant fails to meet its burden on every aspect of its claim, and the claim should be rejected. The Respondent was formed in February, 2020 to register and hold domains for the benefit of a non-profit organization, Everything.sucks Inc. Everything.sucks has created a platform for users to exercise their free speech rights to engage in discussion and criticism on a wide variety of topics. Id. Users may create Wiki pages at Everything.sucks, devoted to critical commentary on a particular subject. Id. After a user creates a page, Everything.sucks may register a corresponding domain under the “.sucks” TLD to direct interested users to the relevant Wiki page. Id. Each page aggregates commentary and criticism of that topic and allows users to post additional commentary and criticism. On October 15, 2020, Respondent registered the Disputed Domain Name and caused it to resolve to a corresponding Wiki page for Cargotec, a space for free discussion and criticism of that company and its business. Using a typical format for critique websites, the Disputed Domain Name combines the company name or brand with the TLD “.sucks.” See Alsace Croisieres SA v. Livingstone / Write Place Publications Inc., Case No. D2013-2025 (WIPO Jan. 11, 2014) (noting that the “appendage ‘sucks’ . . . has become well-known as an identifier of criticism sites”). Respondent has consistently used this format for registered criticism websites since the .sucks registry was first created.

The CARGOTEC SUCKS Wiki page contains a prominent yellow speech bubble in the upper left corner stating “Cargotec Sucks” right above the tagline “TELL THE WORLD!” The site displays third-party criticisms of the company, including criticisms of its treatment of employees. Id. The site looks nothing like Complainant’s own website, which includes images of ships, and Complainant’s red and black logo. No one encountering Respondent’s website would conclude that the site is owned by or affiliated with Complainant. Rather, Complainant is attempting to use this proceeding to prevent legitimate criticism of its business. As previous panels have held, “[t]he Policy should not be used to shut down robust debate and criticism. Allowing trademark owners to shut down sites that obviously are aimed at criticism of the trademark holder does just that.” See Wal-Mart Stores, Inc. v. wallmartcanadasucks.com and Kenneth J. Harvey, Case No. D2000-1104 (WIPO Nov. 23, 2000). In order for Complainant to succeed, it must establish by a preponderance of the evidence that: (i) <cargotec.sucks> is identical or confusingly similar to a mark in which the Complainant has rights; (ii) Respondent has no

rights or legitimate interest in the Disputed Domain Name; and (iii) Respondent registered and is using the Disputed Domain Name in bad faith. See UDRP 4(a)(i)-(iii); The Institute of Electrical and Electronics Engineers, Inc. v. IARAS/Administration IARAS, Case No. DAM2010-0001 (WIPO Dec. 8, 2010) ("The requirements of the Policy are conjunctive; failure of the Claimant to prove any of them results in the denial of the Complaint."). Complainant cannot meet its burden of proof on any of these elements.

The Disputed Domain Name Is Not Identical or Confusingly Similar to Trademarks in Which Complainant Has Rights. See UDRP 4(a)(i). The Complainant argues that "[t]he addition of .sucks gTLD does not detract from the fact that the identical word CARGOTEC is entirely reproduced." The TLD at issue here, however, .sucks, is not like other generic top level domains. Its pejorative nature renders the domain name as a whole nonidentical and prevents confusion. See McLane Company, Inc. v. Craig, Case No. D2000-1455 (WIPO Jan. 11, 2001) ("in the case of the term 'sucks,' the addition of the generic term does reduce the likelihood of confusion."). The inclusion of ".sucks" makes abundantly clear that the website is not affiliated with Complainant and instead contain criticism of its business. The cases Complainant cites are therefore inapposite. See L'Oreal v. Smith, Case No. D2013-0820 (WIPO Jul. 30, 2013) (the gTLD was ".com" and the disputed domain merely added the terms "uk" and "haircare" to Complainant's trademark); Titoni AG v. Runxin Wang, Case No. D2008-0820 (WIPO Jul. 15, 2008) (disputed domain only added the gTLD ".biz" to Complainant's trademark); Alstom v. Itete Peru S.A., Case No. D2009-0877 (WIPO Aug. 27, 2009) (disputed domain adding only a descriptive term and the gTLD ".com" to Complainant's trademark); Dr. Ing. H.c. F. Porsche AG v. Terkin, Case No. D2003-0888 (WIPO Jan. 6, 2004) (disputed domain merely added generic term "autoparts" and the gTLD ".com" to Complainant's trademark).

As previous panels have noted, "confusingly similar" means that "by reason of its similarity with the Complainant's trade mark," the domain name "is likely to lead to a substantial (i.e. not insignificant) level of confusion among Internet users . . . that the Domain Name is or may very well be a domain name belonging to the Complainant or licensed by the Complainant." Asda Group Ltd. v. Kilgour, Case No. D2002-0857 (WIPO Nov. 11, 2002). That is not the case here. Like the unsuccessful complainant in Asda Group, "the Complainant puts forward no evidence to substantiate [the] contention" that the Disputed Domain is "identical" or "confusingly similar." Asda Group, Case No. D2002-0857.Indeed, no reasonable user would think that Complainant sponsored or was affiliated with a website called <cargotec.sucks>, where the domain name itself contains negative feedback. See Wal-Mart, Case No. D2000-1104 ("I conclude that a domain name including the word 'sucks' cannot be confusingly similar, and that a privilege for criticism and parody reinforces that conclusion"); see also Lockheed Martin Corp. v. Parisi, Case No. D2000-1015 (WIPO Jan. 26, 2001) ("Both common sense and a reading of the plain language of the Policy support the view that a domain name combining a trademark with the word 'sucks' . . . cannot be considered confusingly similar to the trademark"); McClane, No. D2000-1455 ("[I]t should be evident to a viewer that any site reached using 'mclanenortheastsucks.com' is not sponsored or endorsed by the trademark owner."). As the panel in Asda Group noted in 2002, "by now the number of Internet users who do not appreciate the significance of the '-sucks' suffix must be so small as to be de minimis and not worthy of consideration." Asda Group, No. D2002-0857.

Complainant selectively quotes the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("WIPO Overview") to argue that a domain consisting of a trademark and the word "sucks" is to be considered similar to the trademark. However, the cited paragraphs of the WIPO Overview discuss similarity for purposes of standing, not for purposes of assessing the merits of likelihood of confusion. As shown below, other sections of the WIPO Overview support Respondent's positions in this case. The Respondent does not dispute the Complainant's standing, but Complainant must still adduce evidence to satisfy 4(a)(1) on the merits, not merely conclusory statements. Consequently, the Panel should deny relief because Complainant has not satisfied 4(a)(i) of the Policy.

The Respondent Has Rights or Legitimate Interests in the Disputed Domain Name as Hosting a Criticism Site is a Legitimate Interest. Therefore the Complainant cannot demonstrate that Respondent has no rights or legitimate interests in the Disputed Domain Name. See UDRP 4(a)(ii); See Ryanair Ltd. v. Coulston, Case No. D2006-1194 (WIPO Dec. 12, 2006) ("It is the Complainant's burden to prove that Respondent lacks rights or a legitimate interest"). Paragraph 4(c) of the Policy sets out circumstances demonstrating Respondent's rights or legitimate interests to the Disputed Domain Name, including where Respondent makes "a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue." UDRP 4(c)(iii). The website's purpose is to allow users to voice legitimate criticisms of Complainant's business. Further, Complainant fails to show that Respondent

intended to misleadingly divert consumers or sought to tarnish Complainant's trademarks. Because the disputed domain names are legitimate fair uses, Complainant cannot meet this element. WIPO Overview 2.6.3 further explains that "[w]here the domain name is not identical to the complainant's trademark, but it comprises the mark plus a derogatory term (e.g., <trademarksucks.tld>), panels tend to find that the respondent has a legitimate interest in using the trademark as part of the domain name of a criticism site if such use is prima facie noncommercial, genuinely fair, and not misleading or false." Using a trademark for purposes of criticism and commentary is noncommercial fair use. As discussed above, the Disputed Domain provides a space (on a site operated by a non-profit entity) to aggregate feedback and allow users to exercise their free speech rights to post genuine criticism of Complainant's business. It is irrelevant whether the Respondent is the party posting the criticism or whether Respondent is providing a forum for other users to exercise their free speech rights. Equity Charter School, Inc. v. Davids, Case No. D2011-1226 (WIPO Sept. 20, 2011) ("It seems to this Panel that the right to free speech . . . must include the right to make comment, and invite others to comment, on [] fundamental concerns"); X/Open Company Limited v. Expeditious Investments, Case No. D2002-0294 (WIPO 2002) (finding legitimate interest where the respondent operated "a free-speech forum"). Respondent submits that CAC Case No. 103142 ("BIODERMA.SUCKS"), to the extent it holds that a third party hosting a criticism site cannot "invoke rights of free speech/freedom of expression," was wrongly decided in light of UDRP 4(c)(iii) and WIPO Overview 2.6.3. The better precedent is CAC Case No. 103141 ("MIRAPEX.SUCKS"), also involving this Respondent, which credited Respondent's arguments that the Respondent's "uses or intends to use the Disputed Domain Name for the purposes of legitimate criticism and free expression." Freedom of speech and freedom of expression are well established rights under, for example, Article 10 of the European Convention on Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Sept. 3, 1953, 213 U.N.T.S. 222. Furthermore, the Final Report of the WIPO Internet Domain Name Process issued in 1999 recognized that "[d]omain name registrations that are justified by legitimate free speech rights" would "not be considered to be abusive." And, as previous panels have explained, "[t]he use of a domain name to criticize a company is prima facie fair use," and "[t]he Respondent is entitled to use the Internet to use . . . free speech rights." Shell International Petroleum Co. Ltd. v. Donovan, Case No. D2005-0538 (WIPO Aug. 8, 2005); see also McLane, Case No. D2000-1455 ("Protest and commentary is the quintessential noncommercial fair use envisioned by the Policy"). Incorporating a company's trademark in a domain "that indicates that it is critical of the Complainant" in order to "to identify the Complainant for the purpose of operating a website that criticizes Complainant" is "generally described as 'fair use.'" Alsace, Case No. D2013-2025. Complainant cannot use its trademark as a shield against "contrary and critical views when such views are legitimately expressed without an intention for commercial gain." Britannia Building Society v. Britannia Fraud Prevention, Case No. D2001-0505 (WIPO Jul. 6, 2001). As previous panels have explained, "[u]se of the Policy to provide such insulation would radically undermine freedom of discourse on the internet and would undercut the free and orderly exchange of ideas that the Policy seeks to promote." The Complainant argues that the fact that some of the posted reviews are synthesized from Indeed.com—a job posting site that permits employees to post reviews—somehow renders the criticism "not genuine." As Complainant's own evidence shows, the aggregated reviews are reviews of Cargotec. Furthermore, Complainant misstates the standard for a "genuine criticism site." ("As the reviews are provided by third parties, the Respondent has no way of knowing anything of the genuineness of any criticisms"). A "genuine criticism site" is one that is "undertaken by its proprietors with no intent other than to protest, ridicule and mock its targets, does not fall astray of the dictates of the Policy, regardless of the outrageousness of the allegations it contains or the vigorousness with which they are made." Britannia Building Society, Case No. D2001-0505. The disputed domain resolves to a genuine criticism site, which, far from containing the "ridicule" deemed permissible in Britannia, provides a forum for criticism and discussion of Cargotec. Further, to the extent Respondent is equating "genuineness" with "truthfulness," panels have repeatedly held that a UDRP proceeding is not the proper forum for addressing claims of defamation. The United Grand Lodge of Queensland v. Redacted for Privacy, 1&1 Internet Inc. / Alfred Warburton, Case No. D2018-2862 (WIPO Mar. 14, 2019) (domain name is used "to protest actions of the Complainant's leadership . . . These statements might be deemed defamatory and may well be actionable if they are untrue. But their truth or falsity cannot be determined definitively in the limited scope of a UDRP proceeding."); Wyles v. FlokiNET Ltd WhoisProtection, FlokiNET Ltd, Case No. 2020-0947 (WIPO Jun. 8, 2020) (same); MUFG Union Bank, N.A. v. Bookout, Case No. DME2014-0008 (WIPO Dec. 3, 2014) ("A UDRP proceeding, however, is not an appropriate or practical forum for ascertaining the truthfulness of the allegations published on the Respondent's website . . . It suffices for UDRP purposes to determine whether the website is genuinely devoted to a free speech purpose such as commentary and criticism"); Leen v. Domain Registry, PeRiQuito Holding, Case No. D2019-2481, (WIPO Dec. 18, 2019) ("questions regarding whether criticism on a respondent's website is accurate or defamatory are generally considered to fall outside of the scope of the Policy").

The Mere Fact that the Domain can be Purchased Does Not Render the Use Illegitimate. The Complainant also attempts to argue that because the Disputed Domain Name is offered for sale, its use is "definitely commercial." Not so. As is obvious from the comments listed on the website—the same comments Complainant cites—the site's purpose is to provide information about Cargotec's practices and a forum for users to engage in discussions about Cargotec. The fact that the Disputed Domain Name is being offered for sale does not detract from that purpose. See Case No. 103141 ("MIRAPEX.SUCKS"). The Policy further provides that Respondent must make a legitimate fair use "without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue," not merely "without intent for commercial gain." UDRP 4(c)(iii). Thus, commercial gain is permitted if there is no intent to mislead or tarnish. For example, in Amylin Pharmaceuticals, a law firm registered the domain name <byettacancer.com> and launched a website promoting its legal services to individuals who took Byetta and later developed cancer. The website had a clear commercial purpose, yet the panel found fair use, stating "the Respondent does not seek to gain commercially by 'misleadingly divert[ing] customers,' or by 'tarnish[ing] the trademark."' (reasoning that "the website is quite clear about its intention (there is no diversion)" and criticism of Complainant was not tarnishment). Amylin Pharmaceuticals, Inc. v. Watts Guerra Craft LLP, Case No. D2012-0486 (WIPO Apr. 29, 2012). Here, Complainant does not and cannot allege that Respondent and Complainant are competitors and cannot show that the Respondent intended to gain some competitive advantage. The Complainant also cannot—and does not attempt to—show that the Disputed Domain Name misleadingly diverts consumers. First, the presence of the TLD "sucks" makes it abundantly clear that the website contains criticism of Complainant and that it is not affiliated with or sponsored by Complainant. Second, the domain resolves to a Wiki page featuring a prominent yellow speech bubble stating "Cargotec Sucks," as well as clearly critical content from employees of the company. Therefore, "it is immediately apparent on arriving at the website . . . that it is not the Complainant's website," and any visitor "could be under no illusions that the website was the Complainant's website or endorsed by the Complainant." See Digicel Caribbean Ltd. V. Domains by Proxy, LLC / Jamie Mcullan, Case No. D2015-1854 (WIPO Nov. 26, 2015); see also San Lorenzo S.p.A. v. Domain Admin, Privacy Protect, LLC / Hitler Neosilil, Case No. D2017-2426 (WIPO Feb. 27, 2018) ("not only the disputed domain name contains the term 'sucks', but the latter is prominently shown in capital letters at all times where [Complainant's logo appears]," making clear "that the website under the disputed domain name has not been set up by Complainant" and "is a clear criticism site"); Titan Enterprises (Qid) Ply Ltd v. Dale Cross / Contact Privacy Inc, Case No. D2015-2062 (WIPO Jan. 13, 2016) ("Respondent, in registering the Domain Name … that indicates that it is critical of the Complainant, is not attempting to impersonate the Complainant or misleadingly divert Internet users.").

Moreover, Complainant fails to substantively address tarnishment, merely citing WIPO Overview Section 2.6 for the proposition that "in a number of UDRP decisions where a respondent argues that its domain name is being used for free speech purposes the panel has found this to be primarily a pretext for cybersquatting, commercial activity, or tarnishment." AC at 7. This does not even attempt to prove that the Disputed Domain Name is being used for tarnishment. Criticism is not the equivalent of tarnishment, and the fact that a site primarily hosts criticism does not mean that Respondent's intent was to tarnish Complainant's mark. McLane, No. D2000-1455. Panels have differentiated between criticism and tarnishment, explaining that "[t]arnishment in this context does not mean criticism. If it did, every website critical of a brand owner could be deemed a tarnishing use. Rather, [t]arnishment in this context refers to such unseemly conduct as linking unrelated pornographic, violent or drug-related images or information to an otherwise wholesome mark." Ryanair, No. D2006-1194; see also Alsace, No. D2013-2025 (explaining that "[f]air-use criticism does not necessarily constitute tarnishment" and finding no tarnishment were Respondent's website described Complainant as "Corrupt Deceitful Liars"). As in Ryanair, "Respondent's site criticizes complainant and its business practices, sometimes in harsh terms, but it does not associate the [Complainant's mark] with any unwholesome activity." Ryanair, Case No. D2006-1194. The website constitutes an exercise of free speech, not tarnishment. See San Lorenzo, Case No. D2017-2426 ("Complainant, however, has failed to provide any evidence as to why the criticism contained on the website was . . . not covered by any reasonable exercise of a right of freedom of speech.").

The Complainant cites WIPO Overview 2.6.2 for the proposition that "even where [] a domain name is used in relation to genuine non-commercial free speech, panels tend to find that this creates an impermissible risk of user confusion through impersonation." The WIPO Overview, however, references cases involving "a domain name identical to a trademark (i.e., <trademark.tld> (including typos))." But 2.6.3 specifies that a domain name "compris[ing] the mark plus a derogatory term (e.g., <trademarksucks.tld>)" is "not identical to the complainant's trademark." Id. at 2.6.3. The inclusion of the TLD .sucks necessarily renders the Disputed Domain nonidentical. The primary purpose of the registration is to provide a forum for

criticism and discussion of Complainant. See Wizz Air Hungary Airlines LLC v. Holden Thomas, Case No. D2009-1105 (WIPO Sept. 22, 2009) (finding "insufficient evidence to suggest the Website has been used … for commercial gain" and even if Respondent sold merchandise through his criticism website, "such sales would have been merely ancillary to the main purpose of the Website in criticizing the Complainant"). Respondent is well within its rights to offer to sell the domain to interested buyers. Respondent has never used the domain to intentionally misdirect customers looking for Complainant's services. As there is no evidence that Respondent intended to infringe on Complainant's rights, Respondent's services are indeed bona fide and Respondent has demonstrated a legitimate interest in the domain pursuant to Paragraph 4(c). See American Eyewear, Inc. v. Thralow, Inc., Case No. D2001-0991 (WIPO October 24, 2001) ("In the absence of contradictory facts suggesting a deliberate intent to infringe . . . [r]espondent's use of the Domain Name was bona fide.").

The Respondent neither Registered nor is using the Disputed Domain Name in Bad Faith. The burden of proof under 4(a)(iii) of the Policy lies with Complainant, and Complainant again failed to substantiate any of its claims. William S. Russell v. John Paul Batrice d/b/a the Clock Doc, Case No. D2004-0906 (WIPO Dec. 13, 2004). First, Complainant claims that "[t]he website does not have any content which would justify its use." Adding the TLD ".sucks" to "cargotec" immediately communicates the site is directed to criticism of the brand. As previous panels have held, use of Complainant's trademark for the purpose of directing visitors to a website that provides commentary, criticism and review of Complainant's products is a legitimate, fair use. Alsace, Case No. D2013-2025. Indeed, while Complainant falsely asserts that the website has no use except to "target[] the trademark owner with a purpose of selling the domain," ICANN evidently believed that the .sucks TLD has a different purpose or it would not have awarded the TLD in the first place. As the registry itself states, the primary purpose of the ".sucks" tld is to allow people to "Tell the world WHAT.sucks." Allowing brand owners to claim bad faith merely because the registrant of BRAND.sucks is not associated with BRAND would undermine a key purpose of the TLD that ICANN itself sanctioned. Second, Complaint cites WIPO Overview 3.1.4 for the proposition that "[p]anels have consistently found that the mere registration of a domain name that is identical or confusingly similar … to a famous or widely-known trademark by an unaffiliated entity can by itself create a presumption of bad faith." However, the WIPO Overview also states that "certain critical terms (e.g., <trademarksucks.com>) tend to communicate, prima facie at least, that there is no such affiliation" and uses <trademarksucks.tld> as an example of a domain name that "is not identical to complainant's trademark," but instead "comprises the mark plus a derogatory term."

Third, despite Complainant's claims, the mere offer to sell a domain is not evidence of bad faith. See Case No. 103141 ("MIRAPEX.SUCKS") at 10 ("The Panel also finds that the offering of a domain name for sale is not by itself evidence of bad faith"). In fact, even offers to sell to the Complainant are not evidence of bad faith if other elements are not met. As previous panels have explained, "selling a domain name is not per se prohibited by the ICANN Policy (nor is it . . . in a capitalist system, ethically reprehensible). Selling of domain names is prohibited by the ICANN Policy only if the other elements of the policy are also violated, namely trademark infringement and lack of legitimate interest." See Manchester Airport PLC and Club Limited, Case No. D2000-0638 (WIPO Aug. 22, 2000) (emphasis in original). Here, the website's primary purpose is a fair one: to provide a space to both inform users and provide a forum for open debate and criticism, and Complainant has failed to establish either confusing similarity or lack of a legitimate interest. As such, Respondent's open offers to sell are bona fide and do not evince bad faith. See Valve Corp. v. ValveNET, Inc., Charles Morrin, Case No. D2005-0038 (WIPO Mar. 9, 2005) ("the offer to sell a domain name does not constitute bad faith unless the seller registered the mark primarily for the purpose of capitalizing on the trademark or service mark value inherent in the name by selling it to the mark owner or its competitors."); see also Match.com, LP v. Bill Zag and NWLAWS.ORG, Case No. D2004-0230 (WIPO Jun. 2, 2004) ("Where the domain name registrant is not seeking to profit from the trademark value in a domain name, than [sic] a use or offer for sale is bona fide"). As discussed above, the website does not seek to profit from the trademark value in domain name. Instead, it makes fair use of Complainant's trademark to direct users interested in criticism of Cargotec to the website's Wiki page. See Buhl Optical Co. v. Mailbank.com, Case No. D2000-1277 (WIPO Mar. 1, 2001) ("the Panel notes that even had Respondent made the disputed offer to sell the domain name at issue, since the Respondent has rights or legitimate interests in respect of the domain name, such an offer of sale would not constitute bad faith."). And, "it remains the Complainant's burden to establish such bad faith registration." Valve Corp, Case No. D2005-0038. The Complainant has failed to meet this burden. The Complainant has also failed to present any evidence of bad faith identified in Paragraph 4(b) of the Policy. First, Complainant has not shown that Respondent registered the Disputed Domain Name primarily for the purpose of selling it to the Complainant. See UDRP 4(b)(i). The Complainant only discusses Respondent's general offer to sell the domain and suggests without any evidence that a .sucks TLD may "coerce [a trademark owner] into buying the

.sucks domain name." As discussed above, Respondent registered the <cargotec.sucks> domain for Everything.sucks in order to support a criticism and commentary website. The Complaint baldly argues that Respondent registered the Disputed Domain Name "with the primary purpose of selling, renting, or otherwise transferring it to the Complainant," but makes no allegations that the Respondent has attempted to sell it to the Complainant and offers no evidence that Respondent is attempting to sell it for a price "in excess of [its] documented out-of-pocket costs." UDRP 4(b)(i). This is because Respondent has never attempted to sell the domain name to the Complainant; Respondent never communicated with the Complainant before this proceeding was filed. Baseless allegations are not sufficient to show bad faith. Mediaset, Case No. D2011-1954 ("mere assertions of bad faith without supporting facts or specific examples" are insufficient to find bad faith). Moreover, the fact that Respondent "has registered numerous .sucks domains" is not evidence of either a "commercial purpose" or "bad faith." As mentioned above, the Respondent was formed to register and hold domain names for the benefit of a non-profit organization which has created a platform for aggregating criticism and commentary on a variety of topics. And, as discussed, the mere offer to sell a domain is not evidence of bad faith. Second, Complainant has not even attempted to show that Respondent registered the domain name in order to prevent Complainant from reflecting the mark in a corresponding domain name. See UDRP 4(b)(ii). Complainant argues that irrespective of Respondent's intent, the Panel should find bad faith because Respondent's registration has "cause[d] harm" to Cargotec. It is unclear what "harm" Cargotec is referencing. Criticism is not "bad faith simply because the criticism might have an adverse impact on the Complainant's business." MUFG Union Bank, Case No. DME2014-0008. Furthermore, Complainant claims that the Disputed Domain Name harmed Cargotec by "prevent[ing] Cargotec from reflecting their trademark CARGOTEC in a corresponding domain name." See AC at 10. However, even though the .SUCKS registry was created five years ago, this domain was not registered until October 15, 2020. Complainant had five years to register this domain and chose not to do so. Third, Respondent and Complainant are not competitors and Complainant has not shown that Respondent purchased the domain names to disrupt the Complainant's businesses. See UDRP 4(b)(iii). A competitor under the Policy is "a person or entity in competition with a complainant for the provision of goods or services, and not merely a person or entity with an interest oppositional to that of a mark holder." Ryanair, Case No. D2006-1194; see also Britannia Building Society, Case No. D2001-0505. Complainant uses the CARGOTEC mark in connection with the provision of cargo and loading equipment, while Respondent registers and holds domain names for the benefit of a non-profit organization. Similar to Ryanair, "Complainant does not contend that Respondent is [its] 'competitor' … and thus, however disrupting Complainant may find Respondent's conduct, it is not bad faith under paragraph 4(b)(iii) of the Policy." Ryanair, Case No. D2006-1194. Finally, Complainant has not shown that Respondent registered the domain in an intentional attempt to attract Internet users to the Respondent's website for commercial gain. See UDRP 4(b)(iv). As detailed above, the purpose of the domain name is to provide a non-commercial forum for users to exercise free speech rights and engage in criticism and commentary on Cargotec. For all of the foregoing reasons, the Complaint should be dismissed.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the disputed 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 disputed 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 disputed 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

Majority Decision (Thomas Hoeren and The Hon. Neil Brown, QC)

The Complainant has, to the satisfaction of two of the Panelists, shown the Disputed 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). These Panelists note that the Respondent does not actively contest the Complainant's case on this element of the Policy. The Disputed Domain Name is identical to its trademark Cargotec. Indeed, the second level of the Disputed Domain Name includes in its entirety the above mentioned trademark without any adjunction of letter or word. The addition of the new gTLD ".SUCKS" does not add any distinctiveness. It is the view of two of the three UDRP Panelists in this proceeding under the Policy that a domain name consisting of a trademark and a negative or pejorative term (such as [trademark]sucks.com) generally would be considered confusingly similar to a complainant's mark for purposes of the standing requirement of the first element of the Policy. The same applies to the gTLD ".sucks" used in combination with a protected trademark. Although the generic Top-Level Domain ("gTLD") may in appropriate circumstances be considered when evaluating identity or confusing similarity, gTLDs may also be disregarded, and usually are not taken into consideration when evaluating the identity or confusing similarity between the complainant's mark and the disputed domain name. See Magnum Piering, Inc. v. The Mudjackers and Garwood S. Wilson, Sr., WIPO Case No. D2000-1525; Rollerblade, Inc. v. Chris McCrady, WIPO Case No. D2000-0429; Phenomedia AG v. Meta Verzeichnis Com, WIPO Case No. D2001-0374.

No rights or legitimate interests. The Complainant has, to the satisfaction of these two Panelists, shown the Respondent to have no rights or legitimate interests in respect of the Disputed Domain Name (within the meaning of paragraph 4(a)(ii) of the Policy). The Respondent is not identified in the WHOIS as synonymous with the Disputed Domain Name and has not acquired trademark rights in this term. Indeed, past panels have held that a Respondent was not commonly known by a disputed domain name if the WHOIS information was not similar to the disputed domain name itself (see for instance FORUM Case No. FA 1781783, Skechers U.S.A., Inc. and Skechers U.S.A., Inc. II v. Chad Moston / Elite Media Group <bobsfromsketchers.com>). Furthermore, the Respondent is not affiliated with the Complainant nor authorized by it in any way to use the trademark CARGOTEC® in a domain name or on a website. The Complainant does not carry out any activity for, nor has any business with the Respondent. The Respondent argues that it is making fair use of the Disputed Domain Name to engage in protected speech such as criticism and commentary. It correctly points to section 2.6 of the WIPO Overview 3.0 as a guide to what previous panels have found in this area. For we two Panelists, the Respondent's case fails in connection with section 2.6.1 of the Overview whereby "the respondent's criticism must be genuine and non-commercial" noting that "in a number of UDRP decisions where a respondent argues that its domain name is being used for free speech purposes the panel has found this to be primarily a pretext for cybersquatting, commercial activity, or tarnishment"(see similary Case No. 103142 "BIODERMA.SUCKS"). We two Panelists are in general fully aware of the need to protect free speech and the freedom of expression in domain law cases. But in this special case, it is important to note that the Respondent is not the person who is said to be making the allegedly free speech commentary or criticism. The Respondent is a third party, or at least claims to be. Yet the Respondent is the registrant of the Disputed Domain Name, not some other person who may or may not have a genuine gripe to make about the Complainant. In fact, the Respondent has no way of knowing anything of the genuineness of any criticisms made on the associated website. The process by which the Disputed Domain Name was registered seems to be automatic and, importantly, took place before any criticism whatsoever was even present on the website (as may be inferred from the Parties' evidence, namely the Complainant's screenshot of June 24, 2020). The alleged criticism seems to have been added as an afterthought between that date and the date when the Response was filed, further calling its genuineness into question. The Respondent has no direct relationship with any person who might, or might not, be able to invoke rights of free speech/freedom of expression under the laws of any particular jurisdiction (or indeed who might be able to invoke the fair use defence under the Policy, were it the registrant of the Disputed Domain Name. The Respondent has no knowledge of whether any such person using its site might be able to invoke such rights, nor is it in any position to engage in any balancing exercise with the trademark owner's rights. Even assuming a third party generated the page on the Respondent's website in order to engage in non-commercial criticism, rather than the Respondent itself, the Respondent immediately proceeds to exploit the position commercially by registering and offering the Disputed Domain Name for sale. In fact, the Respondent is an offshore company (Honey Salt Ltd., based in Turks and Caicos Islands) doing business, among others, in registering ".sucks" domain names and selling them. In the specific circumstances of this case, the Respondent's entire endeavour seems to these two Panelists to be a pretext for commercial activity. Section 2.6.3 of the WIPO Overview 3.0 notes that use may be fair if prima facie non-commercial, genuinely fair and not misleading or false, adding that incidental commercial activity e.g. fundraising may also be permitted. This does not apply here – the use is prima facie commercial, potentially furthering the ultimate commercial aims of the

Respondent's website, and it is definitely commercial in the sense of a proposed sale of the Disputed Domain Name (the Respondent says it intends to develop the websites and to resell domains such as the disputed domain name "to parties that may wish to use [it] for expanded or enhanced commentary or feedback purposes on their own site"). In the present case, there is also doubt as to the genuineness of the criticism (a matter on which the Respondent must accept that it can never answer as it is not, nor does it act for, the party allegedly making the criticism). A useful discussion of the overall position is to be found in HAI Global v. Dane Rose, CAC 102016, June 25, 2018. This suggests that the assessment on rights and legitimate interests proceeds in light of available evidence including the website at the Disputed Domain Name but is not a full assessment of the merits and demerits of the substantive criticism. It adds that such assessment will necessarily overlap with consideration of the wording of paragraph 4(c) of the Policy, excluding situations where there is intent for commercial gain etc. The Panel considers that this accords with its approach as outlined above – intent for commercial gain is present and there is no need to go further than that. In UPWORK INC. v. Sunny Kumar, CAC 101294, October 30, 2016 and Novartis AG v. BRANDIT GmbH, CAC 103013, May 26, 2020 (both decided by the same Panelist – here the dissenting Panelist Victoria McEvedy and take broadly the same approach as each other. These focus perhaps a little too much on EU law for this Panel (attracting the same criticism as those decisions which originally applied US First Amendment principles). Nevertheless, the cases apply an "all circumstances" view which the Panel believes is consistent with its own analysis above. Importantly, in each of these cases, the respondent, in whose favour the panel found, was the person seeking to make genuine criticism or to publish genuinely held views/commentary about the complainant. It was not a third party, as in the present case. Finally, these two Panelists have reviewed Intesa Sanpaolo S.p.A. v. Robert Sloan, CAC 102267, January 24, 2019. The panel in that case notes that "it has been said time and time again in relevant decisions that to rely on the free speech defence, the site must be used solely for a real criticism or fan site and not for commercial purposes under the guise of a criticism site."

Bad faith. The Complainant has, to the satisfaction of these two Panelists, shown the Disputed Domain Name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy). The Respondent clearly knew the identity of the Complainant and had intent to target its rights for commercial purposes before it registered the Disputed Domain Name. It follows from the previous discussion on the second element that the Disputed Domain Name is not connected with genuine non-commercial criticism of the Complainant and that the Respondent's approach was to take unfair commercial advantage of the Complainant's name and trademark while having no actual criticism or free speech of its own in which to engage. It looked to sell the Disputed Domain Name on the open market before any criticism had even been published. The fact that the Disputed Domain Name is used for a web page not containing genuine criticism content but only automatically generated links loosely related to the Complainant's product (as demonstrated by the Complainant's screenshot dating from before the filing of the present Complaint) constitutes further evidence of bad faith. The fact that the Disputed Domain Name is used in a page containing links to other companies and where the relevant domain names (to which the links point) are systematically put on sale by the Respondent is additional evidence of cybersquatting. In the opinion of these two Panelists, due to the fact that the Disputed Domain Name is not used for a genuine criticism website, the arguments put forward by the Respondent cannot be accepted. As explained by the Respondent, "where a respondent has a legitimate interest in the domain name, a general offer for sale is not evidence of bad faith". However, this reasoning does not apply to the present case, because the Respondent does not have any legitimate interest in the Disputed Domain Name. Furthermore, these two Panelists do not agree with the Respondent's argument based on the "descriptive impression" and "descriptive purposes" of .sucks domain names, because this would imply that anyone would be free to register .sucks domain names corresponding to third-party trademarks regardless of their intent and purpose in so doing. In the opinion of the Panel, only a non-profit organization (or a private person) could be entitled to register .sucks domain names corresponding to a third-party trademark of which the registrant has prior knowledge, and only then for use in connection with a genuine and active criticism web site.

Dissenting Decision (Victoria McEvedy)

The other two Panelists have provided a majority decision and this is the minority dissenting decision. This case concerns a non-profit organization, Everything.sucks Inc., which has a platform for end-users to post comments and engage in discussion and criticism on a wide variety of topics (The Platform). Users create Wiki pages on the Platform on a particular subject/subject matter. The Platform hosts a kind of thread for others to add to or comment on the opening posts and the

subject. The Respondent is related to the Platform and deals with its domains and registered the Disputed Domain Name under the ".sucks" TLD to list a page in search and/or direct web traffic to the relevant page of the Platform. In this case, on 15 October 2020, the Respondent registered the Disputed Domain Name and directed it to resolve to the corresponding page which is about the Complainant.

As to identity, there is none. It is a strict standard and is not met. There is no identity but there is similarity, although it is not confusing. Indeed, there is also no impersonation as the .sucks clearly signals that the page/site to which it resolves will be a gripe or sucks site. No one will therefore confuse that for the Complainant, and they will immediately recognise that it is "about" the Complainant and not the Complainant. Here the gTLD is relevant to the analysis.

This is a case where the real issue is whether the Respondent has a defence of legitimate use under the Policy. From the very early cases, it was clear that gripe or fan sites were capable of being legitimate uses. Indeed, ICANN approved the .sucks gTLD in 2015. Subsequent UDRP cases tend to have fallen into categories such as fan sites, sucks sites or parody sites and newly "brand criticism." It is now accepted that there is the narrow and wide view and an "all circumstances view," see Bettinger Domain Name Law and Practice, Second Edition at pp.1398-1399 IIIE.334.-339. This Panelist prefers the all circumstances approach and adopts it here. Arguably the rest of the Panel took the narrow view.

By way of background, as the Respondent rightly says, in the EU, its Freedom of Expression is protected by art. 10 of the European Convention on Human Rights (ECHR) – but it is conditional and subject to the rights of others in art. 10(2) including to reputation. Here then, the Complainant has a right to reputation under art.8 and also rights as an owner of a name and mark protected by Art. 1, of the First Protocol. When fundamental rights conflict or compete – there is a balancing act that involves an intense focus on the values in play. The rights of third parties are also relevant to that analysis. The balance is also struck in trade mark law and norms. The UDRP Policy is based on harmonised international trade mark norms so it can be helpful to test it against those norms in borderline cases.

In trade mark law, the type of use in this case is "Nominative". The Complainant's name is being used to say something about the Complainant. This type of use is protected in various ways in EU trade mark law. It is not regarded as trade mark use and would not sustain an infringement claim as this nominative use does not impact the "badge of origin function" of the mark. US trade mark law will also protect such use as fair use, and this covers news and criticism. At the intersection between speech and trade marks, under the First Amendment, speech usually always wins.

As noted above, when fundamental rights compete – such as property rights (trade marks) and reputation rights as against freedom of expression – there is a balancing act that involves an intense focus on the values in play. The rights of third parties are also relevant. Here they must include the authors/posters/those making the comments on the Platform and also the public/ internet readers. Their rights must be considered. Freedom of Expression includes and protects the right to receive information.

The Complainant opposes the public criticism/ criticism of its business and wants to ideally stop or at least to demote it - to protect its reputation. The Respondent and Everything.sucks Inc run a business that facilitates and enables the expression of others.

Taking this conflict, we must consider for example if a company can stop a newspaper or TV station reporting on a company's business performance by claiming trade mark infringement when its name is used – this is that same scenario. Trade marks cannot and should not be used to supress criticism and discussion. It is not trade mark infringement for a newspaper to publish an item about the Complainant. The Respondent/the Platform are in the same position as a publisher such as a newspaper or magazine which hosts third party comments. The Respondent does have a commercial interest, but it is not its only interest, it is also interested in publishing the speech of others and providing a forum for their exercise of their rights.

The fact that there is some commercial motivation is not determinative. It certainly is not determinative under either US or EU law. The law recognises the commercial reality of life and so must the Policy. A newspaper publisher is entitled to earn remuneration and so is a Platform. Today, there is no valid distinction on this between the professional media and other

speakers. All enjoy protection for freedom of expression/speech. I do not therefore think its valid to suggest that the fact there is a business model and presumably some advertising prevents the use from being legitimate. Neither its interests nor the fundamental rights of its users/posters and readers can just be dismissed because there is advertisement or profit. Nor is speech only legitimate in really "genuine" or direct or "deserving" cases. That is not the right way around. The whole point of law to protect speech is to also protect encroachment in undeserving or unsympathetic cases. Or as previous panels have held, "[t]he Policy should not be used to shut down robust debate and criticism. Allowing trademark owners to shut down sites that obviously are aimed at criticism of the trademark holder does just that." See Wal-Mart Stores, Inc. v. wallmartcanadasucks.com and Kenneth J. Harvey, Case No. D2000-1104 (WIPO Nov. 23, 2000). See also Shell International Petroleum Co. Ltd. v. Donovan, Case No. D2005-0538 (WIPO Aug. 8, 2005), McLane, Case No. D2000-1455 ("Protest and commentary is the quintessential non-commercial fair use envisioned by the Policy"). Incorporating a company's trademark in a domain "that indicates that it is critical of the Complainant" in order to "to identify the Complainant for the purpose of operating a website that criticizes Complainant" is "generally described as 'fair use'" Alsace, Case No. D2013-2025, see also Britannia Building Society v. Britannia Fraud Prevention, Case No. D2001-0505 (WIPO Jul. 6, 2001). As previous panels have explained, "[u]se of the Policy to provide such insulation would radically undermine freedom of discourse on the internet and would undercut the free and orderly exchange of ideas that the Policy seeks to promote."

If the Complainant has an issue with its reputation it must take it up with the courts if it crosses the line into defamation. Panels have repeatedly held that a UDRP proceeding is not the proper forum for addressing claims of defamation. See The United Grand Lodge of Queensland v. Redacted for Privacy, 1&1 Internet Inc. / Alfred Warburton, Case No. D2018-2862 (WIPO Mar. 14, 2019), Wyles v. FlokiNET Ltd WhoisProtection, FlokiNET Ltd, Case No. 2020-0947 (WIPO Jun. 8, 2020); MUFG Union Bank, N.A. v. Bookout, Case No. DME2014-0008 (WIPO Dec. 3, 2014) ("A UDRP proceeding, however, is not an appropriate or practical forum for ascertaining the truthfulness of the allegations published on the Respondent's website . . . It suffices for UDRP purposes to determine whether the website is genuinely devoted to a free speech purpose such as commentary and criticism") and Nor is there either free-riding or unfair competition or passing-off or what US trademark law calls tarnishment, type of dilution (as opposed to free-riding). Criticism is not the equivalent of tarnishment, and the fact that a site primarily hosts criticism does not mean that Respondent's intent was to tarnish Complainant's mark. McLane, No. D2000-1455. Panels have distinguished criticism and tarnishment, explaining that otherwise "every website critical of a brand owner could be deemed a tarnishing use. Rather, [t]arnishment in this context refers to such unseemly conduct as linking unrelated pornographic, violent or drug-related images or information to an otherwise wholesome mark." Ryanair, No. D2006-1194; see also Alsace, No. D2013-2025. Criticism is not "bad faith simply because the criticism might have an adverse impact on the Complainant's business." MUFG Union Bank, Case No. DME2014-0008.Leen v. Domain Registry, PeRiQuito Holding, Case No. D2019-2481, (WIPO Dec. 18, 2019) ("questions regarding whether criticism on a respondent's website is accurate or defamatory are generally considered to fall outside of the scope of the Policy").

Nor is there either free-riding or unfair competition or passing-off or what US trademark law calls tarnishment, type of dilution (as opposed to free-riding). Criticism is not the equivalent of tarnishment, and the fact that a site primarily hosts criticism does not mean that Respondent's intent was to tarnish Complainant's mark. McLane, No. D2000-1455. Panels have distinguished criticism and tarnishment, explaining that otherwise "every website critical of a brand owner could be deemed a tarnishing use. Rather, [t]arnishment in this context refers to such unseemly conduct as linking unrelated pornographic, violent or drug-related images or information to an otherwise wholesome mark." Ryanair, No. D2006-1194; see also Alsace, No. D2013-2025. Criticism is not "bad faith simply because the criticism might have an adverse impact on the Complainant's business." MUFG Union Bank, Case No. DME2014-0008.

The posts that this Panelist reviewed, contain opinions. Under EU and indeed US law, no-one can be forced to prove the truth or his opinion (only the facts on which it is based). Nor must opinions have to be reasonable or direct or "genuine." Contribution to a debate of public interest is however a relevant criterion and there is a constant public interest in freedom of expression itself. The Complainant suggests that the comments are either not real or generic or somehow computer generated or copied. However the impression they made on this Panelist was that they appear to be real comments and criticisms posted by members of the public, workers and customers of the Complainant. They appeared mild and reasonably balanced but they do not have to be either of those things to be protected speech.

There is also evidence that there is a listing for sale of the Disputed Domain Name. A mere offer alone to sell a domain is not

evidence of bad faith. As previous panels have explained, “selling a domain name is not per se prohibited by the ICANN Policy (nor is it . . . in a capitalist system, ethically reprehensible). Selling of domain names is prohibited by the ICANN Policy only if the other elements of the policy are also violated, namely trademark infringement and lack of legitimate interest.” See Manchester Airport PLC and Club Limited, Case No. D2000-0638 (WIPO Aug. 22, 2000). See Valve Corp. v. ValveNET, Inc., Charles Morrin, Case No. D2005-0038 (WIPO Mar. 9, 2005) and see also Match.com, LP v. Bill Zag and NWLAWS.ORG, Case No. D2004-0230 (WIPO Jun. 2, 2004). See Case No. 103141 (“MIRAPEX.SUCKS”) at 10 (“The Panel also finds that the offering of a domain name for sale is not by itself evidence of bad faith”).

In summary, where there is legitimate use, there will usually not be bad faith and it is so here. This Panelist finds the Complaint is rejected.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **CARGOTEC.SUCKS**: Transferred

PANELLISTS

Name	**Victoria McEvedy, Thomas Hoeren, The Hon. Neil Brown, QC**

DATE OF PANEL DECISION 2021-02-19

Publish the Decision