

## **ADMINISTRATIVE PANEL DECISION**

Neometals Ltd v. DOMAIN ADMIN, DOMAIN PRIVACY SERVICE FBO  
REGISTRANT / lisa deere  
Case No. D2022-2360

### **1. The Parties**

The Complainant is Neometals Ltd, Australia, represented by Wrays, Australia.

The Respondent is DOMAIN ADMIN, DOMAIN PRIVACY SERVICE FBO REGISTRANT, United States of America / lisa deere, Canada.

### **2. The Domain Name and Registrar**

The disputed domain name <neometals.com> is registered with FastDomain, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on June 29, 2022. On June 29, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On June 29, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name, which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to the Complainant on June 30, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on July 5, 2022.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on July 5, 2022. In accordance with the Rules, paragraph 5, the due date for Response was July 25, 2022. The Respondent submitted an automatic reply on July 5, 2022, however, did not submit any formal response. Accordingly, the Center notified the Respondent’s default on July 26, 2022.

The Center appointed Andrew D. S. Lothian as the sole panelist in this matter on July 29, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

On August 4, 2022, the Panel issued Procedural Order No. 1 to the Parties, which noted that the public Whois records for the disputed domain name indicated that it was created on August 5, 2012 and that the Complainant contended that it was unclear when the Respondent first registered or acquired the disputed domain name. Accordingly, the Panel invited the Respondent to indicate the precise date on which it registered or acquired the disputed domain name, and to provide supporting evidence (*e.g.*, related correspondence with the Registrar *etc.*). The Panel noted that it may make an inference, as appropriate in the full circumstances of the case, in the absence of such evidence or suitable explanation in response to this request. The Complainant was invited to submit comments to any response received from the Respondent on or before August 15, 2022, and the Decision due date was extended to August 22, 2022. The Respondent did not reply to Procedural Order No. 1 by the deadline concerned, namely on or before August 9, 2022.

#### **4. Factual Background**

The Complainant is an Australian public company, incorporated in 2001. It had an initial founding focus on gold and base metals exploration mining, and has since evolved into exploration and development of advanced minerals. The Complainant now focuses on three core projects, namely, lithium-ion battery recycling, vanadium recovery, and Barrambie titanium and vanadium. The Complainant is listed on the Australian Stock Exchange (“ASX”).

The Complainant’s refocusing of its business into what it describes as “new” world metals resulted in it changing its name to Neometals Ltd on December 12, 2014, following notice to its shareholders on October 29, 2014. The Complainant has used the name “Neometals” in connection with the new focus of its business since that date and does business online under the domain name <neometals.com.au>, which it states that it registered on or about December 14, 2014. Screenshots of the Complainant’s corresponding website are available on the Internet Archive “Wayback Machine” (“Internet Archive”) dating from 2014 to date.

The Complainant is the owner of Australian Registered Trademark No. 1665435 for the word mark NEOMETALS, filed on December 18, 2014 and registered on January 10, 2017 in Classes 1, 6, and 40. The Complainant is also the owner of Australian Registered Trademark No. 1665424 for a figurative mark consisting of the letters “Nm” in light blue, fading to green from left to right, surrounded by a square box, also light blue, fading to green from left to right, filed on December 18, 2014 and registered on July 22, 2015 in Classes 1, 6, and 40. The Complainant’s social media following includes LinkedIn (more than 4,600 followers), Twitter (more than 3,100 followers) and Vimeo (more than 25 followers).

The disputed domain name was registered on August 5, 2012. Key to the Complainant’s case is its assertion that the Respondent must have acquired the disputed domain name after this date. Screenshots from the Internet Archive of the corresponding website show (1) a non-configured Apache server page on June 14, 2013; (2) a hosting company’s parking page, without advertisements, on January 1, 2014; (3) a website allegedly for a business named “NM Neometals” or “Neometals LP”, allegedly specializing in technology transfer for the clean mining and advanced metals sector on December 21, 2014; and (4) apparent references to the Complainant’s business from about January 20, 2022. The latter incarnation of the website is entitled “NEOMETALS LP | Technology Without Borders” although it also uses the Complainant’s logo and figurative mark, together with an image of, and quotes from, the Complainant’s managing director contained in a press release dated June 20, 2017, and an investor briefing dated August 3, 2020. The footer of this site states “© 2022 NEOMETALS LP | WordPress Theme : [theme]”.

## **5. Parties' Contentions**

### **A. Complainant**

In summary, the Complainant contends as follows:

#### **Identical or confusingly similar**

The Complainant has rights in its registered trademark and also unregistered rights in the mark NEOMETALS. The Top-Level-Domain ("TLD") in the disputed domain name may be disregarded, meaning the disputed domain name consists solely of the Complainant's registered and unregistered trademark. The disputed domain name is therefore identical to the Complainant's trademark.

#### **Rights or legitimate interests**

The Respondent has no rights or legitimate interests in the disputed domain name. The Respondent has used the disputed domain name with intent to disrupt the Complainant's business or take advantage of its reputation. The Respondent, as disclosed by the Registrar, is not commonly known by the disputed domain name to the best of the Complainant's knowledge. The disputed domain name resolves to a website which has referred to an entity name, "Neometals LP" but a search of the United States of America's Securities and Exchange Commission's "Company and Person Lookup" does not identify any existing company under such name. Since around January 2022, the said website has featured quotes from, and an image of, the Complainant's managing director. The Complainant and its managing director have not authorized these. Also since January 2022, said website has used the Complainant's figurative and NEOMETALS trademarks. The NEOMETALS mark has no value apart from its association with the Complainant.

#### **Registered and used in bad faith**

The Respondent has registered and is using the disputed domain name in bad faith by intentionally attempting to attract Internet users to the associated website for commercial gain by creating a likelihood of confusion with the Complainant's NEOMETALS mark as to the source, sponsorship, affiliation, or endorsement of such website. By featuring the Complainant's details, the Respondent has demonstrated that it is aware of the Complainant, yet it has no connection with the Complainant. Its very use by such a person suggests opportunistic bad faith. The Respondent appears to be intending to disrupt the business of a competitor. The use of the disputed domain name has the potential to create confusion and embarrassment to the Complainant among its consumers and those who mistakenly visit the Respondent's website. It is unclear when the Respondent registered the disputed domain name notwithstanding the Whois entry. The disputed domain name did not resolve to an active website until on or about December 21, 2014. This is suspicious as it immediately follows the Respondent's change of name and associated public announcement, the registration of its domain name, and the applications for its registered trademarks.

### **B. Respondent**

The Respondent did not reply to the Complainant's contentions.

## **6. Discussion and Findings**

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

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and

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

### **A. Identical or Confusingly Similar**

The first element inquiry under the Policy usually proceeds in two parts. First, the Complainant must demonstrate that it has UDRP-relevant rights in a trademark, whether registered or unregistered. Secondly, such trademark is compared with the disputed domain name, typically on a straightforward side-by-side basis, usually disregarding the TLD, in order to assess identity or confusing similarity. If, on the basis of such comparison, the disputed domain name is seen to be identical to the Complainant's trademark, identity will generally be found, while if the Complainant's mark is otherwise recognizable in the disputed domain name, confusing similarity will usually be found.

In the present case, the Complainant claims rights in its NEOMETALS registered trademark, as described in the factual background section above. The Panel finds that the Complainant has UDRP-relevant rights in this mark. It is not necessary for the purposes of the first element analysis that the mark pre-date the Respondent's registration or acquisition of the disputed domain name. The Complainant also claims that it possesses an unregistered trademark in the NEOMETALS mark since the date of its first use in December 2014. Section 1.3 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)") sets out the types of evidence generally required to establish an unregistered mark for the purposes of the Policy, namely (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys. In the present case, the evidence before the Panel focuses upon the Complainant's change of name, which demonstrates a duration of use of just under eight years. It is also evident from the record that the Complainant has a not-insignificant following on social media under such name and is a publicly quoted company listed on the Australian Stock Exchange, among other public listings. The Panel is satisfied on the basis of this evidence that the Complainant possesses unregistered trademark rights in the NEOMETALS mark.

Turning to the comparison exercise, the Panel notes that the disputed domain name is identical to the Complainant's NEOMETALS mark, when the TLD is disregarded as discussed above. The Respondent has not made any comment or challenge regarding the Complainant's submissions, neither to the Complainant's claim to unregistered trademark rights nor as to the question of identity or confusing similarity between the disputed domain name and the Complainant's said mark.

In all of these circumstances, the Panel finds that the disputed domain name is identical to the Complainant's trademark and accordingly that the Complainant has carried its burden with regard to paragraph 4(a)(i) of the Policy.

### **B. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy lists several ways in which the Respondent may demonstrate rights or legitimate interests in the disputed domain name:

"Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of paragraph 4(a)(ii):

- (i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services; or
- (ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate non-commercial 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.”

The consensus of previous decisions under the Policy is that a complainant may establish this element by making out a *prima facie* case, not rebutted by the respondent, that the respondent has no rights or legitimate interests in a domain name. Where the panel finds that a complainant has made out such a *prima facie* case, the burden of production shifts to the respondent to bring forward evidence of such rights or legitimate interests.

In the present case, the Panel finds that the Complainant has made out a *prima facie* case that the Respondent has no rights or legitimate interests in the disputed domain name based on its submissions that the Respondent is not commonly known by the disputed domain name, that the company claimed to be represented on the website associated with the disputed domain name is non-existent, and that the latter versions of said website appear to be impersonating the Complainant by featuring an unauthorized images and quotes from the Complainant’s managing director, together with the Complainant’s figurative and NEOMETALS trademarks, which the Complainant asserts to have no value other than via their association with the Complainant. The Panel notes in this context that panels under the Policy tend to assess Respondent rights or legitimate interests in the present, *i.e.*, with a view to the circumstances prevailing at the time of the filing of the complaint (see section 2.11 of the [WIPO Overview 3.0](#)). In finding that the Complainant has made out the requisite *prima facie* case on this topic, the Panel has therefore focused principally upon the current incarnation of the website associated with the disputed domain name.

The burden of production accordingly shifts to the Respondent to bring forward evidence of any rights or legitimate interests which it might have in the disputed domain name. The Respondent has not replied to the Complainant’s contentions and has not taken up the opportunity to rebut the Complainant’s *prima facie* case. The Panel cannot conceive of any rights or legitimate interests that the Respondent might have asserted in the disputed domain name, given that the associated website appears to impersonate the Complainant’s company through the use of an image and quotes from the Complainant’s managing director, together with the reproduction of the Complainant’s figurative mark and NEOMETALS mark. The fact that this also bears to be the site of a third party entity named “Neometals LP” is nothing to the point.

Accordingly, there being no rebuttal, or likely potential rebuttal, on the Respondent’s part, the Panel finds that the Complainant has carried its burden in respect of paragraph 4(a)(ii) of the Policy.

### **C. Registered and Used in Bad Faith**

Paragraph 4(b) of the Policy provides four, non-exclusive, circumstances that, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

“(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out of pocket costs directly related to the domain name; or

(ii) you have 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 you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other online location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of your website or location or of a product or service on your website or location.”

The Panel is satisfied that the disputed domain name is being used in bad faith. It is identical to the Complainant's mark. The associated website appears to impersonate the Complainant by reproducing an image and quotes from the Complainant's managing director, and also features the Complainant's NEOMETALS trademark and, notably, its NM figurative trademark. This demonstrates a clear intent to target the Complainant's rights, potentially for the purpose of disrupting the business of a competitor or fraud, or perhaps to bring the disputed domain name to the Complainant's attention with a view ultimately to engaging in purchase and sale negotiations. In any event, whatever the Respondent's precise motivation in using the disputed domain name in this way, it could not be considered to be a good faith activity.

Turning to the question of registration in bad faith, the Panel notes that the creation date of the disputed domain name pre-dates the coming into existence of the Complainant's trademarks, and even the Complainant's change of name, by at least some two years. Section 3.8.1 of [WIPO Overview 3.0](#) notes that where a domain name is registered before the complainant's trademark rights accrue, panels will not normally find bad faith on the part of the respondent. Nevertheless, in this case, the Complainant has raised a compelling argument, based on the evidence of a change in use of the disputed domain name, that the Respondent more likely than not did not register the disputed domain name in 2012 but rather acquired it after the Complainant's announced change of name, and potentially after the establishment of the Complainant's trademark rights in the NEOMETALS mark. If so, the assessment of registration in bad faith would take place not as at the original date of registration in 2012 but as at the date of such acquisition.

Historic Whois entries, consulted by the Panel, are of no assistance in answering the question.<sup>1</sup> Ultimately, the principal party who could answer the question is the Respondent, as the date of registration or acquisition is undoubtedly within its knowledge. For that reason, by way of Procedural Order No. 1, and in the face of the evidence of a change in content put forward by the Complainant, the Panel invited the Respondent to provide any evidence or a suitable explanation pertaining to the matter. The Panel warned that an inference might be taken, if appropriate in the whole circumstances of the case, should the Respondent fail to address the topic. The Respondent did not reply. The Panel makes the reasonable inference that if the Respondent had had any evidence of its registration or acquisition of the disputed domain name in good faith between 2012 and 2014, it would have tendered it in the context of the administrative proceeding. The Panel also infers from the Respondent's silence on this matter following upon Procedural Order No. 1 that the Complainant's suspicions are probably correct, and that it may be reasonably presumed that the disputed domain name was acquired by the Respondent at some point after its original registration date. It should be borne in mind that the Policy does not require a panel to presume that the current registrant of a domain name is necessarily its original registrant, particularly if the facts and circumstances suggest otherwise.

The most reasonable assumption to make in the present case is that the Respondent acquired the disputed domain name around the time when the associated website began to display substantive content. This took place around the end of December 2014. As noted in the factual background section above, the Respondent's website at that date claimed to be operated by an entity named "Neometals LP". The reference to this named entity has remained in the various iterations of the said website up to the present day, where it is now coupled with an express reference to the Complainant's trademarks and business. This continued presence of the "Neometals LP" name reasonably suggests to the Panel that there has been a similar continuity of registrant behind the disputed domain name across that period. Accordingly, the Panel finds that late December 2014 is most likely the date of the Respondent's acquisition of the disputed domain name.

Proceeding on that basis, the Panel notes that the acquisition came almost immediately on the heels of the Complainant's official announcement of its change of name, and the filing of the Complainant's trademark applications. Section 3.8.2 of the [WIPO Overview 3.0](#) describes an exception to the general rule outlined in section 3.8.1 above in certain limited circumstances where the facts of the case establish that the respondent's intent in registering the domain name was to unfairly capitalize on the complainant's nascent

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<sup>1</sup> With regard to the Panel conducting limited factual research into matters of public record, such as consulting relevant publicly available websites, see section 4.8 of the [WIPO Overview 3.0](#).

(typically as yet unregistered) trademark rights. Such scenarios include registration of a domain name: (i) shortly before or after announcement of a corporate merger, (ii) further to the respondent's insider knowledge (e.g., a former employee), (iii) further to significant media attention (e.g., in connection with a product launch or prominent event), or (iv) following the complainant's filing of a trademark application. The Panel considers that the facts and circumstances of the present case effectively describe both of the scenarios numbered (iii) and (iv). The exception to the general rule therefore applies, and the Panel finds on the balance of probabilities that the disputed domain name was acquired (registered) in bad faith.

As noted above, in addition to its failure to respond to Procedural Order No. 1, the Respondent did not file a Response in this matter. It has failed to provide any explanation for its registration and use of the disputed domain name. As far as the Panel can tell, the entity "Neometals LP" did not and does not exist, based upon the fact that the website associated with the disputed domain name contains no corporate information, such as an entity type, business registration number, business address, or other contact details. The Panel notes that the Complainant carried out a search for such business in the United States of America's Securities and Exchange Commission's "Company and Person Lookup" but the Panel does not exclusively rely upon the outcome of that search, given that it is likely only to disclose entities regulated by the said Commission, while the Respondent is allegedly based in Canada. In any event, even if the entity did or does exist, it is clearly being used to target the Complainant's rights in a manner which suggests opportunistic bad faith commencing around late December 2014. Accordingly, the record does not indicate any possible good faith motivation to the Panel which the Respondent might have put forward in this matter had it participated in the administrative proceeding.

In all of these circumstances, the Panel finds that the Complainant has carried its burden in terms of paragraph 4(a)(iii) of the Policy.

## **7. Decision**

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name <neometals.com> be transferred to the Complainant.

*/Andrew D. S. Lothian/*

**Andrew D. S. Lothian**

Sole Panelist

Date: August 22, 2022