

## **ADMINISTRATIVE PANEL DECISION**

### **XNT LTD. v. Ekaterina Shelud'ko, ForexAW.com**

### **Case No. D2022-4133**

#### **1. The Parties**

The Complainant is XNT LTD., Malta, represented internally.

The Respondent is Ekaterina Shelud'ko, ForexAW.com, Russian Federation.

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

The disputed domain name <exante.pro> is registered with Internet Domain Service BS Corp (the "Registrar").

#### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on November 1, 2022. On November 3, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 4, 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 (Domain Admin, Whois Privacy Corp.) and contact information in the Complaint. The Center sent an email communication to the Complainant on November 7, 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 a first amendment to the Complaint on November 8, 2022. The Complainant filed a second amendment to the Complaint to comply with paragraph 4(b) of the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules") on November 23, 2022.

The Center verified that the Complaint together with the amendments to the 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 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 November 24, 2022. In accordance with the Rules, paragraph 5, the due date for Response was December 14, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on December 21, 2022.

The Center appointed Andrew D. S. Lothian as the sole panelist in this matter on January 9, 2023. 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.

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

The Complainant is a company with an address in Malta which provides investment and financial services. Its official website is located at "www.exante.eu".

The Complainant is the owner of a variety of registered trademarks for the device mark consisting of a green hexagon design together with the word EXANTE in grey, either below or alongside the hexagon. For example, the Complainant is the owner of Russian Federation Registered Trademark no. 745664 for such device, registered on February 7, 2020 in Classes 9 and 36. The Complainant is also the owner of International Registered Trademark no. 1497029 for such device, registered on September 4, 2019 in Classes 9 and 36, and designated in respect of the United States of America and Canada. The Complainant is also the owner of two registered trademarks for such device which are undergoing a challenge that may result in their removal from the registry, namely European Union Registered Trademark no. 015567928, and United Kingdom Registered Trademark no. UK00915567928, both registered on October 24, 2016 in Class 36.

The disputed domain name was registered on April 28, 2017. According to a screenshot provided by the Complainant, the website associated with the disputed domain name appears to be in Russian. A machine translation of said website translates the site as referencing the Complainant, reproducing the Complainant's mark along with the word "scam" and warning people not to do business with the Complainant, describing it as a "fraudulent organization" and as "scammers" ("мошенники").

#### **5. Parties' Contentions**

##### **A. Complainant**

In summary, the Complainant contends as follows:

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

The Complainant's EXANTE mark is clearly recognizable in the disputed domain name and is used in the corresponding website content. The Respondent registered the disputed domain name precisely because it believed that it was identical to the Complainant's registered trademark.

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

The Respondent has no affiliation or connection with the Complainant and neither the Complainant nor its subsidiaries or affiliates have licensed or otherwise permitted the Respondent to register or use the disputed domain name. The Respondent is not using the disputed domain name for a *bona fide* offering of goods or services. None of the individuals who are mentioned on the corresponding website as contact persons have ever been commonly known by the disputed domain name and the Complainant's trademark.

The website associated with the disputed domain name is defamatory, contains numerous misrepresentations regarding the Complainant, including an allegation that the Complainant is on a blacklist of the Central Bank of Russia, and is beyond any fair criticism. It is designed to persuade users not to do business with the Complainant and contains mostly derogatory terms, obscene photographs, unverified reviews, feedback of people presented as the Complainant's users, and strong allegations that the Complainant is not returning its clients' money, without actual proof. Said feedback refers to a website which

offers paid chargeback services that may be operated by the Respondent or its affiliates and may be a pretext for commercial gain. These may harm the Complainant's business and may encourage Internet users to engage in fraudulent chargebacks.

The Respondent is not making fair use of the disputed domain name. It is using the disputed domain name to falsely convey an association with the Complainant to lead Internet users to its website. By using a domain name that is identical to the Complainant's trademark, the Respondent creates an impression that such users are visiting the Complainant's official website. The Respondent has used no additional word or term in the disputed domain name that may identify the disputed domain name as resolving to a criticism website. There is nothing in the disputed domain name to make it clear to Internet users that they are visiting a website containing fair or genuine criticism or protests against the Complainant.

Deceptive use of another's trademark as a domain name is rarely, if ever, likely to grant a right or legitimate interest in such domain name, and the right to criticize does not extend to include registering a domain name that is identical to the rights holders' mark. The Respondent has used the Complainant's registered trademark alone as the disputed domain name as that may be understood by Internet users as impersonating the Complainant. The right of free speech does not necessarily require use of the Complainant's trademark in the disputed domain name.

#### Registered and used in bad faith

The disputed domain name was registered on April 28, 2017, in the year following the registration of the Complainant's trademark. The Respondent knew of the Complainant and its rights in said trademark when it registered the disputed domain name. The Respondent used the identical word for the disputed domain name to that used in the Complainant's trademark, and reproduced said trademark itself in the website content, thus demonstrating its awareness of the Complainant's rights at the moment of registration.

The website content consists of a single page with highly offensive and abusive comments and derogatory terms regarding the Complainant, indicating the Respondent's willingness to defame the Complainant and to turn Complainant's potential clients away from the Complainant. The Respondent's purpose was and still is to cause damage to the Complainant and to disrupt its business. The Respondent is encouraging Internet users to use certain shady and potentially fraudulent chargeback schemes, which behavior could be considered evidence of bad faith.

#### **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 Complainant has demonstrated to the Panel's satisfaction that it is the owner of the registered trademarks cited in the factual background section above. It does not matter for the purposes of the Policy

that two of the marks concerned are undergoing a challenge that may result in their removal from the registry. In the first place, the marks remain *ex facie* valid as at the date of filing of the Complaint and at the date of this decision, and in the second place, the Complainant has other valid marks on which it may rely. These latter marks do not predate the registration of the disputed domain name but this is not a requirement of paragraph 4(a)(i) of the Policy.

The Complainant's marks all appear to be figurative in nature, containing a graphical element together with a word element. Section 1.10 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)") describes how trademark registrations with such elements are typically treated in assessing identity or confusing similarity under the Policy, noting that figurative or stylized elements are largely disregarded to the extent that they would be incapable of representation in domain names. Disregarding the figurative element in the present case leaves the Panel with the word element EXANTE for comparison with the disputed domain name. The generic Top-Level Domain ("gTLD") in the disputed domain name (".pro") may be disregarded for the purposes of the comparison exercise on the grounds that this is required for technical reasons only. Accordingly, on the basis of this comparison, it may be seen that the disputed domain name is alphanumerically identical to the Complainant's EXANTE trademark.

In these circumstances, the Panel finds that the disputed domain name is identical to the Complainant's trademark and that the Complainant has carried its burden in terms of 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 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."

In the present case, it may be seen that the disputed domain name is being used in connection with a website that is critical of the Complainant and its business activities. It is not however entirely clear to the Panel as to whether such criticism is wholly noncommercial in nature. The Complainant asserts that the site directs Internet users to a commercial chargeback service and suggests that the Respondent may be benefitting commercially thereby in circumstances where its criticism of the Complainant is merely pretextual. However, there is no evidence before the Panel that the chargeback service was commercial. It appears to have been presented as a service assisting victims of fraud. In any event, the Respondent remains silent in the face of the Complainant's allegation of commercial use. If the Respondent were found to be using the Complainant's mark in the disputed domain name for the purposes of directing the Complainant's consumers to a commercial chargeback service from which it benefits financially, this could not on any view confer rights and legitimate interests upon the Respondent. In the Panel's view, that would not, for example, constitute a limited degree of incidental commercial activity (such as fundraising) to the Respondent's main purpose of criticizing the Complainant (on this topic, see section 2.6.3 of the [WIPO Overview 3.0](#)).

In any event, the Panel does not require to reach a conclusion as to whether the Respondent's alleged commercial use of the disputed domain name is incidental to its provision of criticism of the Complainant.

Even if it could be argued that the Respondent is using the disputed domain name for non-pretextual, noncommercial criticism of the Complainant, it is necessary to consider the disputed domain name in the context of the "impersonation test" (see *Dover Downs Gaming & Entertainment, Inc. v. Domains By Proxy, LLC / Harold Carter Jr, Purlin Pal LLC*, WIPO Case No. [D2019-0633](#)). Panels applying this particular test take the view that, for a Respondent to be able to claim fair use for the purposes of noncommercial criticism under the Policy, the domain name that is used for this alleged purpose must not impersonate the trademark owner and should signal to potential visitors that the associated website is likely to contain content critical of the trademark owner (the example often cited of such a signal is a domain name containing the trademark together with the word "sucks"). On the other hand, if, as here, the domain name concerned is identical to a complainant's trademark, this may be seen to give rise to "an impermissible risk of user confusion" (see section 2.6.2 of the [WIPO Overview 3.0](#)) and is likely *prima facie* to fall foul of the "impersonation test".

The disputed domain name in the present case contains no clear signal as to the presence of critical content. In this Panel's opinion, it falls foul of the "impersonation test" as it merely reproduces the Complainant's trademark in a manner suggesting that it is the location of an official website of the Complainant. In these circumstances, it cannot be considered to constitute fair use within the meaning of the Policy. The public are likely to view such a domain name as being authorized or affiliated with the Complainant when it is not, and may be led to the Respondent's site by way of that deception. Registrants such as the Respondent remain free to select domain names for the purposes of genuine noncommercial criticism so long as such domain names make clear that the registrant is not affiliated with or authorized by the trademark holder concerned. The disputed domain name here expresses the contrary and signals an affiliation with the Complainant and/or impersonates it.

The Respondent has received the opportunity to bring forward evidence and submissions relating to its alleged rights and legitimate interests under the Policy and has chosen not to do so. It has not attempted to answer the Complainant's allegations, whether regarding the "impersonation test" or the alleged commercial pretext behind the Respondent's website. The Panel has identified no facts or circumstances from the present record that may suggest that the Respondent has rights and legitimate interests in the disputed domain name, whether in terms of paragraph 4(c) of the Policy or otherwise.

Accordingly, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name, and that the Complainant has carried its burden in respect of the requirements 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.”

In the present case, the analysis under the third element of the Policy is closely connected to the consideration of the topic of rights and legitimate interests as noted above. In light of the fact that the disputed domain name is identical to the Complainant's trademark, it signals an affiliation with the Complainant that is likely to lead to “an impermissible risk of user confusion” (see section 2.6.2 of the [WIPO Overview 3.0](#)). Given the nature of the content on the associated website, there is no doubt in the Panel's mind that the Respondent registered the disputed domain name with an awareness of the Complainant and its rights and with intent to target these. It does not matter in this particular context that those trademarks which predate the registration of the disputed domain name may yet be subject to cancellation, given that they remain in force at present, and were evidently in force when the disputed domain name was registered. The fact that they may ultimately be cancelled cannot change the fact that the Complainant's rights were being targeted at the material time, all the more so as the Complainant maintains other trademark rights which are not currently undergoing the same procedure that may lead to cancellation.

It is clear that in impersonating the Complainant by way of an unadorned reproduction of the word element of the Complainant's mark, the disputed domain name is likely to divert confused Internet users, who are seeking the Complainant's official website, to the Respondent's website. Such website features critical content of the Complainant which those Internet users are neither seeking, nor expecting. Therein lies the deception at the root of the disputed domain name. The use of such a domain name which makes this kind of *prima facie* misrepresentation “constitutes registration and use in bad faith, which cannot be cured by the content of the Respondent's website (if it is accepted that the content is noncommercial and indeed represents legitimate criticisms, for which latter aspect the Panel makes no findings, as this is generally seen as not being a matter falling within the scope of the Policy)” (see *Netblocks Group v. Collin Anderson*, WIPO Case No. [D2020-2240](#)).

In all of the above circumstances, the Panel finds that the disputed domain name has been registered and is being used in bad faith, and accordingly 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, <exante.pro>, be transferred to the Complainant.

*/Andrew D. S. Lothian/*

**Andrew D. S. Lothian**

Sole Panelist

Date: January 23, 2023