

## **ADMINISTRATIVE PANEL DECISION**

American Vape Company, LLC v. 张金山 (zhang jin shan)  
Case No. D2022-4829

### **1. The Parties**

The Complainant is American Vape Company, LLC, United States of America (“United States”), represented by Frost Brown Todd LLC, United States.

The Respondent is 张金山 (zhang jin shan), China.

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

The disputed domain name <escobarsofficial.com> is registered with Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn) (the “Registrar”).

### **3. Procedural History**

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on December 19, 2022. On December 20, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On December 21, 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 December 21, 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 in English on December 23, 2022.

On December 21, 2022, the Center transmitted an email communication to the Parties in English and Chinese regarding the language of the proceeding. On December 21, 2022, the Complainant confirmed its request that English be the language of the proceeding. The Respondent did not comment on the language of the proceeding.

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 in English and Chinese of the Complaint, and the proceeding commenced on December 28, 2022. In accordance with the Rules, paragraph 5, the due date for Response was January 17, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on January 19, 2023.

The Center appointed Sebastian M.W. Hughes as the sole panelist in this matter on February 1, 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**

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

The Complainant is a company incorporated in the state of Texas in the United States and a distributor in the United States of electronic cigarettes and related accessories under the trade mark ESCO BARS (the "Trade Mark"). The Complainant and its predecessor in title have continuously used the Trade Mark in the United States in respect of the distribution, promotion, and sale of its products since as early as May 2020. The Complainant is the applicant for registration of the Trade Mark, under United States application No. 97012877, filed on September 5, 2021, with a publication date of January 17, 2023.

The Complainant advertises and promotes its products under the Trade Mark by attending industry-specific and industry-related trade shows and exhibitions throughout the United States, spending an average of over USD 40,000 a month for an average of over USD 500,000 annually.

The Complainant's products bearing the Trade Mark are sold in the United States at "Create A Cig" retail stores, and are also advertised and promoted on the "www.createacig.com" website.

##### **B. Respondent**

The Respondent is apparently an individual resident in China.

##### **C. The Disputed Domain Name**

The disputed domain name was registered on April 27, 2022.

##### **D. Use of the Disputed Domain Name**

The disputed domain name is resolved to an English language website with the header "Esco Bars Official Website"; featuring images of and apparently offering for sale the Complainant's products under the Trade Mark; with an address in California, United States; and a bogus copyright notice "Copyright © 2020-2022 Esco Bars INC. All Rights Reserved" (the "Website").

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

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

The Complainant contends that the disputed domain name is identical or confusingly similar to the Trade Mark, the Respondent has no rights or legitimate interests in respect of the disputed domain name, and the disputed domain name was registered and is being used in bad faith.

## **B. Respondent**

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

## **6. Discussion and Findings**

### **6.1 Preliminary Issue: Language of the Proceeding**

The language of the Registration Agreement for the disputed domain name is Chinese.

Pursuant to the Rules, paragraph 11(a), in the absence of an agreement between the parties, or unless specified otherwise in the registration agreement, the language of the administrative proceeding shall be the language of the registration agreement.

Paragraph 11(a) of the Rules allows the Panel to determine the language of the proceeding having regard to all the circumstances. In particular, it is established practice to take paragraphs 10(b) and (c) of the Rules into consideration for the purpose of determining the language of the proceeding, in order to ensure fairness to the parties and the maintenance of an inexpensive and expeditious avenue for resolving domain name disputes. Language requirements should not lead to undue burden being placed on the parties and undue delay to the proceeding (see WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.5.1).

The Complainant has requested that the language of the proceeding be English, for several reasons, including the fact the Website is an English language website with an address in the United States.

The Respondent did not make any submissions regarding the language of the proceeding, and did not file any response.

In exercising its discretion to use a language other than that of the registration agreement, the Panel has to exercise such discretion judicially in the spirit of fairness and justice to both Parties, taking into account all relevant circumstances of the case, including matters such as the Parties' ability to understand and use the proposed language, time, and costs.

In light in particular of the content of the Website, the Panel finds there is sufficient evidence that the Respondent is conversant in English.

The Panel is also mindful of the need to ensure the proceeding is conducted in a timely and cost effective manner.

In all the circumstances, the Panel therefore finds it is not foreseeable that the Respondent would be prejudiced, should English be adopted as the language of the proceeding.

Having considered all the matters above, the Panel determines under paragraph 11(a) of the Rules that the language of the proceeding shall be English.

### **6.2 Substantive Elements of the Policy**

The Complainant must prove each of the three elements in paragraph 4(a) of the Policy in order to prevail.

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

The Panel finds that the Complainant has rights in the Trade Mark acquired through use

The disputed domain name incorporates the entirety of the Trade Mark (see [WIPO Overview 3.0](#), section 1.7) followed by the word “official”.

Where a relevant trade mark is recognisable within a disputed domain name, the addition of other terms (whether descriptive, geographical, pejorative, meaningless, or otherwise) does not prevent a finding of confusing similarity under the first element (see [WIPO Overview 3.0](#), section 1.8).

The Panel therefore finds that the disputed domain name is confusingly similar to the Trade Mark.

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

Paragraph 4(c) of the Policy provides a list of non-exhaustive circumstances any of which is sufficient to demonstrate that a respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to the respondent of the dispute, the respondent’s use of, or demonstrable preparations to use, the disputed domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services; or
- (ii) the respondent (as an individual, business, or other organization) has been commonly known by the disputed domain name even if the respondent has acquired no trade mark or service mark rights; or
- (iii) the respondent is making a legitimate noncommercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

The Complainant has not authorised, licensed, or permitted the Respondent to register or use the disputed domain name or to use the Trade Mark. The Panel finds on the record that there is therefore a *prima facie* case that the Respondent has no rights or legitimate interests in the disputed domain name, and the burden is thus on the Respondent to produce evidence to rebut this presumption.

The Respondent has failed to show that it has acquired any trade mark rights in respect of the disputed domain name or that the disputed domain name has been used in connection with a *bona fide* offering of goods or services. To the contrary, the disputed domain name has been used in connection with the Website, in order to pass off the Website as an official website of or authorised by the Complainant.

There has been no evidence adduced to show that the Respondent has been commonly known by the disputed domain name.

There has been no evidence adduced to show that the Respondent is making a legitimate noncommercial or fair use of the disputed domain name.

Moreover, the nature of the disputed domain name is inherently misleading, and carries a risk of implied affiliation (see [WIPO Overview 3.0](#), section 2.5.1).

In all the circumstances, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name.

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

In light of the manner of use of the disputed domain name highlighted in section 6.2B above, the Panel finds that the requisite element of bad faith has been made out, under paragraph 4(b)(iv) of the Policy.

The content of the Website, including the header and the false copyright notice, and indeed the composition of the disputed domain name itself (comprising the word “official”), all demonstrate that the Respondent has registered and used the disputed domain name in order to target consumers in the United States, by passing

off the Website as an official website authorised by the Complainant to sell its products.

The Panel therefore finds that the disputed domain name has been registered and is being used in bad faith.

## **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 <escobarsofficial.com> be transferred to the Complainant.

*/Sebastian M.W. Hughes/*

**Sebastian M.W. Hughes**

Sole Panelist

Dated: February 12, 2023