

## **ADMINISTRATIVE PANEL DECISION**

Healthyr, LLC v. Jonathan Curd  
Case No. D2023-1802

### **1. The Parties**

Complainant is Healthyr, LLC, United States of America (“United States”), represented by Burr & Forman LLP, United States.

Respondent is Jonathan Curd, United States, represented by John Berryhill, Ph.d., Esq., United States.

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

The disputed domain name <healthyr.com> (hereinafter the “Disputed Domain Name”) is registered with GoDaddy.com, LLC (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on April 21, 2023. On April 24, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Disputed Domain Name. On April 25, 2023, 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 (Domains By Proxy, LLC, o/b/o Private Registrant) and contact information in the Complaint. The Center sent an email communication to Complainant on April 26, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amended Complaint on May 2, 2023.

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 Respondent of the Complaint, and the proceedings commenced on May 4, 2023. In accordance with the Rules, paragraph 5, the due date for Response was May 24, 2023. The Response was filed with the Center on May 17, 2023.

The Center appointed Lawrence K. Nodine as the sole panelist in this matter on June 12, 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

Complainant is an online health provider, specifically offering at-home tests, telehealth services, and pharmacy services. Complainant registered the domain name <behealthyr.com> on April 20, 2022 and uses the corresponding website to offer its services in the United States. Additionally, Complainant owns a pending United States trademark application for the mark HEALTHYR (App. No. 97613060; filed on September 29, 2022) (the “HEALTHYR mark”) that claims a first use date of September 21, 2022.

Respondent is a web developer and marketing consultant in Saint Louis, Missouri. Respondent registered the Disputed Domain Name on August 24, 2006.

Complainant attempted to purchase the Disputed Domain Name from Respondent through a GoDaddy broker on or around September 21, 2022. Respondent refused Complainant’s final USD 5,000 offer, and counteroffered USD 7,500, which Complainant did not accept. Currently, the Disputed Domain Name resolves to a pay-per-click (“PPC”) webpage featuring links for “medical products”, “food supplement”, and “nutritional supplements”.

#### 5. Parties’ Contentions

##### A. Complainant

Complainant alleges that it has used the HEALTHYR mark in commerce since at least September 21, 2022 in connection with at-home tests, telehealth services, and pharmacy services. Complainant cites its website, <behealthyr.com>, social media accounts, and its products’ availability at Costco as evidence of its extensive use and the public’s association of the HEALTHYR mark with Complainant. Complainant contends that through this use, it has acquired common law trademark rights in the HEALTHYR mark. Complainant offers no evidence to support its allegations of widespread recognition of the HEALTHYR mark or evidence of the volume of sales or its advertising expenditures.

Complainant contends that its pending United States trademark application in conjunction with its continuous and systematic use of the HEALTHYR mark establish that it has rights in the HEALTHYR trademark and that the Disputed Domain Name is confusingly similar thereto.

Complainant claims that Respondent is not making a *bona fide* or fair use of the Disputed Domain Name because the website associated with the Disputed Domain Name is a parked webpage and has been for many years. Complainant argues that when it contacted Respondent via a broker at GoDaddy that Respondent did not indicate that it was using or preparing to use the Disputed Domain Name. Complainant alleges that Respondent intends to ransom the Disputed Domain Name to the highest bidder, which does not constitute legitimate, noncommercial fair use.

Complainant contends that Respondent registered and continues to use the Disputed Domain Name in bad faith. Specifically, Complainant alleges that Respondent registered the Disputed Domain Name while Complainant was preparing to launch its business and shortly before Complainant filed its United States trademark application. Complainant claims the timing of Respondent’s registration of the Disputed Domain Name is evidence of Respondent’s knowledge of Complainant’s rights in the HEALTHYR mark. Complainant further argues that Respondent’s final USD 7,000 counteroffer to Complainant’s offer to purchase the Disputed Domain Name is in excess of any out of pocket costs Respondent expended on the Disputed Domain Name and, therefore, is evidence of bad faith under the Policy. Complainant also claims that the webpage associated with the Disputed Domain Name has not hosted content for fifteen years and, therefore, Respondent is using the Disputed Domain Name in bad faith in an effort to extract a monetary sum from Complainant.

After receiving the Response, Complainant requested leave to file a reply, which request Respondent opposed. Complainant did not offer a preview of any proposed argument or identify any particular argument

or evidence submitted by Respondent that Complainant could not have anticipated and it did not preview any argument for the Panel's consideration. The request is denied.

## **B. Respondent**

Respondent replies that Complainant has no standing to bring this Complaint because Complainant does not have a federal trademark registration and Complainant has failed to prove secondary meaning in the HEALTHYR mark.

Respondent asserts that it has rights and a legitimate interest in the Disputed Domain Name because the Disputed Domain Name is a phonetic equivalent of the generic word "healthier", and Respondent has used the Disputed Domain Name in relation to its generic meaning for monetization in connection with health related topics. Respondent further claims that it registered the Disputed Domain Name seventeen years ago in 2006, long before Complainant claims to have first used the HEALTHYR mark.

Respondent contends (and supplies evidence) that it has used the Disputed Domain Name since 2008 in connection with a variety of domain monetization systems for a collection of health and fitness related domain registered to Respondent. For instance, Respondent supplies evidence of archived webpages showing use of the Disputed Domain Name as a pay-per-click ("PPC") webpage, with advertising links for topics related to health.

Respondent states that it registered the Disputed Domain Name in good faith purely because it is the phonetic equivalent of a generic phrase and that Respondent initially purchased the Disputed Domain Name as a potential name for its client in the fitness industry. Respondent argues that because Complainant did not exist for most of the time Respondent has operated the Disputed Domain Name, its registration thereof could not have been premised on Complainant's use of the HEALTHYR mark. Respondent also contends its counteroffers for the sale of the Disputed Domain Name were "good faith prices" and not evidence of bad faith registration and use of the Disputed Domain Name.

## **6. Discussion and Findings**

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

In order to "establish unregistered or common law trademark rights for purposes of the UDRP, a complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant's goods and/or services". WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.3. Relevant evidence may include (i) the duration and nature of use of the mark in question, (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. Id.

In support of its claim of common law rights, Complainant states that its "extensive use of the HEALTHYR trademark has penetrated the entire geographic market of the United States, and, therefore, Complainant has acquired common law rights in the mark in the entire United States". However, given Complainant has used the HEALTHYR mark for less than a year, Complainant would need to submit substantial evidence to support its claim of common law rights. As evidence of its purported "geographic penetration", Complainant points to its social media presence on LinkedIn, Instagram, and Facebook, as well as its HEALTHYR products' availability on Costco.com, and a press release purportedly published on Yahoo.com, although the link does not display the document. While this evidence establishes that Complainant uses the mark in commerce, it does not prove that consumers associate the HEALTHYR mark with Complainant. And the referenced evidence is not quantitatively significant enough to support an inference of consumer awareness.

Additionally, Complainant states that its pending United States trademark application for HEALTHYR is evidence of its use in commerce of the HEALTHYR mark, and of its ownership rights in the mark. While the

application does support (albeit not presumptively) Complainant's claim of use in commerce, it does not establish ownership rights in the HEALTHYR mark for the purposes of the UDRP. See [WIPO Overview 3.0](#), section 1.1.4; see also *Donnelly Minter & Kelly, LLC v. Host Master, 1337 Services LLC*, WIPO Case No. [D2021-1380](#) (“[T]he Complainant's service mark application has not yet proceeded to grant and a pending application, is not a right for the purposes of the first element.”)

For the foregoing reasons, Complainant has failed to satisfy paragraph 4(a)(i) of the Policy.

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

The Panel finds that Respondent has legitimate interests in the Disputed Domain Name as prior to Complainant's adoption of the HEALTHYR mark, Respondent registered the Disputed Domain Name and used the Disputed Domain Name in connection with a *bona fide* offering of services. See [WIPO Overview 3.0](#), section 2.10.1. Respondent has submitted evidence of archived webpages demonstrating its use of the Disputed Domain Name over the years for a PPC webpage with links to health-related topics. Therefore, the Panel finds that preponderance of evidence supports Respondent's claim that it registered the Disputed Domain Name to exploit its descriptive connotations.

Complainant contends Respondent's use of the Disputed Domain Name for PPC links does not give rise to rights or legitimate interests in the Disputed Domain Name. The consensus among UDRP Panelist does not support Complainant.

UDRP panels have found that the use of a domain name to host a parked page comprising PPC links does not represent a *bona fide* offering where such links compete with or capitalize on the reputation and goodwill of the complainant's mark or otherwise mislead Internet users.

UDRP panels have recognized that the use of a domain name to host a page comprising PPC links would be permissible – and therefore consistent with respondent rights or legitimate interests under the UDRP – where the domain name consists of an actual dictionary word(s) or phrase and is used to host PPC links genuinely related to the dictionary meaning of the word(s) or phrase comprising the domain name, and not to trade off the complainant's (or its competitor's) trademark. See [WIPO Overview 3.0](#), section 2.9. In this sense, the Panel notes that the Disputed Domain Name is the phonetic equivalent of the dictionary term “healthier” and that Respondent has used the Disputed Domain Name to host PPC links related to health..

Therefore, Complainant has not satisfied paragraph 4(a)(ii) of the Policy.

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

Complainant has failed to prove registration in bad faith. Complainant incorrectly alleges, “Respondent registered the Disputed Domain Name while Complainant was preparing to launch its business, and shortly before Complainant filed its application for registration with the USPTO”. However, the record shows that Respondent acquired the Disputed Domain Name in August 2006, seventeen years before Complainant first used the HEALTHYR mark. Therefore, Respondent could not have registered the Disputed Domain Name with the intent to profit from Complainant's mark or to interfere with Complainant's business. See [WIPO Overview 3.0](#), section 3.8; see also *Wirecard AG v. Telepathy Inc., Development Services*, WIPO Case No. [D2015-0703](#).

Complainant contends that Respondent's failure to accept Complainant's offers to purchase the Disputed Domain Name for USD 5,000 is evidence of Respondent's bad faith use of the Disputed Domain Name because Respondent requested a payment in return for the sale of the Disputed Domain Name that exceeded its out-of-pocket costs. The record shows Respondent's final offer for the Disputed Domain Name was USD 7,500. While this likely exceeds the price Respondent paid to purchase the Disputed Domain Name, there is no per se rule that an asking price over out-of-pocket costs constitutes definitive evidence of bad faith use of a domain name. See *Türk Ticaret Bankası A.Ş. v. Abdurrahman Kilinc*, WIPO Case No. [D2019-3156](#) (“The Panel finds that the simple argument of requesting an exorbitant price for the transfer of

the disputed domain name is not sufficient to prove that the disputed domain name is registered and used in bad faith.”); see also *Reindl Gesellschaft m.b.H. v. Stanley Pace*, WIPO Case No. [D2019-0160](#) (“If the Respondent’s interest in the Disputed Domain name is legitimate he is entitled to seek whatever price he wishes.”).

Accordingly, the Panel finds Complainant has failed to satisfied paragraph 4(a)(iii) of the Policy.

#### **D. Reverse Domain Name Hijacking**

Paragraph 15(e) of the UDRP Rules provides that, if “after considering the submissions the panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding”. [WIPO Overview 3.0](#), section 4.16. That section of the Overview further provides a number of non-exclusive factors which, in appropriate circumstances, support a finding of Reverse Domain Name Hijacking (“RDNH”). Such factors as may be relevant to the instant proceeding include: “the provision of false evidence, or otherwise attempting to mislead the panel”; and “the provision of intentionally incomplete material evidence--often clarified by the respondent”.

The Panel finds Reverse Domain Name Hijacking because Complainant made factually misleading allegations and key arguments that lacked a plausible legal basis.

First, Complainant had no basis for its critical allegation that “Respondent registered the Disputed Domain Name while Complainant was preparing to launch its business, and shortly before Complainant filed its application for registration with the USPTO [... and therefore] registered the Domain Name for the sole purpose of extracting a large sum of money from Complainant for that Disputed Domain Name”. Complainant knew that this was incorrect. In fact, Complainant expressly alleged that the Disputed Domain Name “was created 7/25/05”. See Complaint ¶ 8 and Complaint Annex 1 (Whois Record).<sup>1</sup> See *TPG Sixth Street Partners, LLC v. David Frieze*, WIPO Case No. [D2019-2051](#) (“The Whois record obtained by the Complaint as of June 2019 would have reflected a ‘Creation Date’ of August 6, 2001, and an ‘Update Date’ of May 9, 2016. Thus, the Complainant knew or clearly should have known when submitting the Complaint that the Respondent had registered the disputed domain name well before the Complainant submitted applications to register the TPG SIXTH STREET PARTNERS marks, first used the marks in commerce, and registered the trademarks with the USPTO.”). Moreover, Complainant attributed the prior fifteen years of PPC usage under the Disputed Domain Name usage to Respondent.

Second, it was misleading for the Complainant to submit an incomplete record of communications with Respondent. Complainant submitted “[a] true and correct copy of Complainant’s communications with GoDaddy’s broker is attached hereto as Annex 5”. This record is incomplete in material respects. The earliest communication in Complainant’s Annex is dated October 7, 2022, which is about a week after Complainant filed its trademark application with the USPTO on September 29, 2022. But there were earlier emails. We know this for a variety of reasons. The October 7 email from the GoDaddy broker to Complainant’s representative bears the subject line “Re: Healthyr Domain Purchase Update”, so we infer there were earlier communications. Furthermore, Respondent’s submitted additional evidence of his communications with the broker, which reflected first communications between Respondent and the broker on September 21, 2022. There is a September 22 email from the broker that says “I spoke with my Buyer, and they have agreed to increase the offer . . .” Unless we assume the broker acted on his own initiative and without authority, it is plain that Complainant authorized the broker to contact Respondent at least as early as September 21, 2022. Importantly, Complainant’s asserted date of first trademark use was the same date—September 21, 2022. These earlier emails reflect material facts that are relevant to and undermine Complainant allegations that Respondent registered the Disputed Domain Name based on knowledge of

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<sup>1</sup> Respondent’s evidence shows that he registered the Disputed Domain Name on August 24, 2006 after the first registrant allowed the original registration to lapse. This transaction is not reflected in the Whois Record attached to the Complaint. Therefore, the Panel does not consider this 2006 transaction when evaluating RDNH, although it is relevant, obviously, to the bad faith registration issue.

Complainant's business plan. It was misleading for the Complainant to affirmatively rely on later records, but omit these earlier records, or to at least acknowledge their content, when basing arguments on the evolution of the negotiations, especially given that these negotiations form the foundation of Complainant's allegations of bad faith

Based on the record evidence, Complainant was well aware of Respondent's ownership of and use of the Disputed Domain Name on the same date it first used the HEALTHYR mark in United States commerce, and before Complainant filed its trademark application for the same. See *Idaho Home Realty LLC v. Michael James Ohlson / Michael Ohlson / Bob Adams*, VVG, WIPO Case No. [D2021-2768](#) (finding Reverse Domain Name Hijacking when there was "no doubt that Complainant knew at the time it filed its Complaint that Respondent had registered the <idahomerealty.com> before Complainant began any use of its claimed IDAHO HOME REALTY and IDAHO HOME REALTY GROUP marks.").

In light of the above, the Panel finds that Complainant brought the Complaint in bad faith, within the meaning of Rule 15(e), in an attempt at Reverse Domain Name Hijacking.

## 7. Decision

For the foregoing reasons, the Complaint is denied.

*/Lawrence K. Nodine/*

**Lawrence K. Nodine**

Sole Panelist

Date: June 26, 2023