

ADMINISTRATIVE PANEL DECISION

Dan Foam ApS v. Anonymous Code
Case No. D2023-1820

1. The Parties

The Complainant is Dan Foam ApS, Denmark, represented by Steptoe & Johnson LLP, United States of America (“United States”).

The Respondent is Anonymous Code, United States.

2. The Domain Name and Registrar

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

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on April 24, 2023. On April 25, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On April 26, 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 (Privacy Service Provided by Withheld for Privacy ehf) and contact information in the Complaint. The Center sent an email communication to the Complainant on April 28, 2023, 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 amendment to the Complaint on May 2, 2023.

The Center verified that the Complaint together with the amendment 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 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 May 5, 2023. In accordance with the Rules, paragraph 5, the due date for Response was May 25, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on May 31, 2023.

The Center appointed Torsten Bettinger 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

The Complainant is the proprietor of a number of registered trademarks comprising TEMPUR in the United States (the TEMPUR marks), in relation to mattresses and other goods. These include;

Trademark	Registration No.	Registration Date
TEMPUR	1,926,469	October 10, 1995
TEMPUR-PEDIC	1,853,088	September 6, 1994
TEMPUR SEALY	4,980,596	June 21, 2016
TEMPUR + SEALY	4,980,595	June 21, 2016

The Complainant began using the TEMPUR-PEDIC mark on October 30, 1992 and use of the TEMPUR mark began at least as early as November 10, 1994.

The Respondent registered the disputed domain name on August 3, 2022. The disputed domain name resolves to an inactive website.

5. Parties' Contentions

A. Complainant

The Complainant provided evidence that it owns and operates company websites accessible through the domain names <tempurpedic.com> and <tempursealy.com> among others.

The Complainant contends that;

- it has spent millions of USD in advertising for products offered in connection with the TEMPUR Marks and has realized millions of USD in sales of said products;
- as a result of the widespread and continuous use and promotion of the Complainant's TEMPUR marks, the marks have achieved tremendous fame and distinctiveness and are widely known and recognized as source identifiers for a variety of goods and services originating with the Complainant and serve to distinguish those goods and services from those of others.

With regard to the requirement of identity or confusing similarity between the trademark and the disputed domain name pursuant to paragraph 4(a)(i) of the Policy, the Complainant asserts that the disputed domain name is confusingly similar to its TEMPUR Marks arguing that;

- small changes in words, such as adding or deleting a hyphen, are insufficient to distinguish marks;
- the addition of the generic Top-Level Domain ("gTLD") ".com" does not distinguish the disputed domain name from the Complainant's registered trademarks.

With regard to the Respondent having no rights or legitimate interests in the disputed domain name, the Complainant submitted that;

- it did not grant any authorization to the Respondent in its use of the TEMPUR Marks;
- the Respondent is not a licensee of the Complainant, nor associated with the Complainant in any way;

- the Respondent is not operating a business under the identified domain name, nor is it affiliated with or commonly known as "Tempur Sealyx";
- the TEMPUR Marks are strong trademarks with no other known meanings and as such, they are not terms the Respondent would legitimately choose unless seeking to make an association with the Complainant;
- the mere registration of a domain name is not sufficient to confer rights or legitimate interests.

Finally, with regard to the disputed domain name having been registered and being used in bad faith, the Complainant contends that:

- the Respondent is engaging in illegal activity by using the disputed domain name to commit fraud. The Respondent has engaged in a phishing attack against one of its authorized retailers in the United States;
- the Respondent used an email address associated with the disputed domain name in order to pose as an employee of the Complainant to deceive an employee its authorized retailer into providing sensitive login credentials and financial information;
- the Respondent gained unauthorized access to email addresses and hijacked an existing email conversation, making it appear as if the email correspondence was legitimate, when it was not;
- a series of emails occurred between the employee of Complainant's retailer, resulting with a substantial sum of money being transferred to a third party rather than the intended recipient at TEMPUR Sealy.

The Complainant provided an Affidavit regarding the Complainant's knowledge of these communications.

B. Respondent

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

6. Discussion and Findings

Paragraph 4(a) of the Policy states that the Complainant must prove each of the three following elements:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- (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 that it owns multiple trademark registrations for the mark TEMPUR, TEMPUR PEDIC and TEMPUR SEALY in the United States, which predate the registration of the disputed domain name on August 3, 2022.

It is well-established that the test of identity or confusing similarity under the Policy is confined to a comparison of a domain name and the trademark alone, independent of the products for which the trademark is used or other marketing and use factors usually considered in trademark infringement cases (see sections 1.1.2 and 1.7 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

In this case, the disputed domain name contains the Complainant's trademarks TEMPUR marks in its entirety and only differs from the Complainant's trademark TEMPUR SEALY by the addition of the letter "x".

Despite the addition of the letter "x" to the TEMPUR SEALY trademark in the disputed domain name, the TEMPUR SEALY trademark remains highly recognizable and does not prevent a finding of confusing similarity.

Further, in accordance with the consensus opinion of past UDRP panels outlined in the [WIPO Overview 3.0](#), section 1.11.1, the gTLD ".com" of the disputed domain name is disregarded under the first element confusing similarity test.

The Panel therefore concludes that the disputed domain name is confusingly similar to the Complainant's TEMPUR SEALY trademark in which the Complainant has rights.

B. Rights or Legitimate Interests

Pursuant to paragraph 4(c) of the Policy a respondent may establish its rights or legitimate interests in the domain name, among other circumstances, by showing any of the following elements:

"(i) before any notice to you [the Respondent] 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 [the Respondent] (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 [the Respondent] 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."

The Complainant provided evidence of its extensive use and promotion of its TEMPUR and TEMPUR SEALY trademarks and stated that the Respondent is not a licensee, authorized agent of the Complainant or in any other way authorized by the Complainant to register the disputed domain name.

These assertions and evidence are sufficient to establish a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name.

Where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the disputed domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. See section 2.1 of the [WIPO Overview 3.0](#).

The Respondent chose not to contest the Complainant's allegations and has failed to come forward with any evidence to refute the Complainant's *prima facie* showing that the Respondent lacks rights or legitimate interests. The Panel therefore accepts these allegations as undisputed facts.

From the record in this case, the Respondent has not used the disputed domain name in connection with a *bona fide* offering of goods or services or a legitimate noncommercial or fair use.

On this basis the Panel concludes that the Respondent lacks rights and legitimate interests in the disputed domain name and that, accordingly, the Complainant has satisfied 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 the Respondent has registered or has acquired the disputed domain name primarily for the purpose of selling, renting or otherwise transferring the disputed domain name registration to the Complainant who is the owner of the trademark or service mark or to a competitor of the Complainant, for valuable consideration in excess of documented out-of-pocket costs directly related to the disputed domain name; or
- ii. the Respondent has registered the disputed 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 the Respondent has engaged in a pattern of such conduct; or
- iii. the Respondent has registered the disputed domain name primarily for the purpose of disrupting the business of a competitor; or
- iv. by using the disputed domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other online location, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website or location or of a product or service on the Respondent's website or location.

The Complainant holds multiple trademark registrations for the mark TEMPUR, TEMPUR PEDIC and TEMPUR SEALY in the United States that predate the registration of the disputed domain name. The Complainant provided evidence that the TEMPUR marks have been extensively used and are widely known.

Given that the disputed domain name, except for the addition of the letter "x", contains the Complainant's trademark TEMPUR in its entirety, it is in the Panel's view very likely that the Respondent was aware of the Complainant at the time he selected the disputed domain name for registration. This is sufficient to infer bad faith registration of the disputed domain name.

The Complainant provided evidence that shows that the Respondent has engaged in a phishing attack against an authorized retailer of the Complainant and has used an email address associated with the disputed domain name in order to impersonate an employee of the Complainant, thus having led one of the Complainant's retailer into providing sensitive login credentials and financial information in order to gain unauthorized access to email addresses, and hijacked an existing email conversation.

According to the Complainant's undisputed submissions, a series of emails occurred between the Complainant's retailer and the Respondent, thus resulting with a substantial sum of money being transferred to a third party rather than the intended recipient.

Such fraudulent use of a domain name is paradigmatic evidence of bad faith use for purposes of paragraph 4(b) of the Policy. The Panel therefore finds that the Complainant has also met its burden under 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, <tempursealyx.com>, be transferred to the Complainant.

/Torsten Bettinger/

Torsten Bettinger

Sole Panelist

Date: June 26, 2023