

## **ADMINISTRATIVE PANEL DECISION**

Avícola Villalobos, Sociedad Anónima, CMI IP Holding v. Andres Gutierrez  
Case No. D2023-2465

### **1. The Parties**

The Complainants are Avícola Villalobos, Sociedad Anónima, Guatemala (the “first Complainant”), and CMI IP Holding, Luxembourg (the “second Complainant”), represented by Consortium Legal, Guatemala.

The Respondent is Andres Gutierrez, Canada.

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

The disputed domain name <casoavicola.com> is registered with Google LLC (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on June 7, 2023. On June 8, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On June 8, 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 (Contact Privacy Inc. Customer 7151571251) and contact information in the Complaint.

The Center sent an email communication to the Complainants also on June 9, 2023 providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainants filed an amendment to the Complaint on June 14, 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 June 21, 2023. In accordance with the Rules, paragraph 5, the due date for Response was July 11, 2023. Upon request, the due date for Response was extended to July 20, 2023. The Response was filed with the Center on July 19, 2023.

The Center appointed Luca Barbero as the sole panelist in this matter on July 26, 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 first Complainant is a Guatemalan company providing poultry slaughtering and processing, which is owned by the multinational company Corporación Multi Inversiones (CMI).

The first Complainant was registered before the Commercial Registry of Guatemala in 1972 and the related tradename AVICOLA VILLALOBOS AV was registered before the Industrial Property Registry of Guatemala in 1979.

The second Complainant is the owner of trademark registrations for POLLO CAMPERO in Guatemala and other countries and also owns a trademark registration for MOLINOS MODERNOS in Guatemala and a trademark registration for DON POLLO in Honduras.

The disputed domain name <casoavicola.com> was registered on October 20, 2022, and has been pointed to a website displaying the Complainants' registered trademarks and providing general information on Complainants, including litigation cases involving the Complainants. Currently, the disputed domain name does not resolve to an active website.

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

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

Guatemalan legislation and other International Conventions recognize and protect tradenames and/or Commercial Names. A tradename owner holds the same rights as a trademark owner. For example, they have the right to exclusively use and to oppose to unauthorized usage of a similar or identical sign from a third party.

The Industrial Property Law of Guatemala (Decree 57-2000 and its amendments) states that a trade name is a word or compound sign that identifies and distinguishes a company, a commercial establishment, or an entity. It further adds that the exclusive right to a trade name is acquired through its first public use in commerce and its registration before the Registry is not mandatory to exercise the rights granted by the law to its owner.

The Complainants submit that the first Complainant owns the tradename and commercial name AVICOLA VILLALOBOS AV Y DISEÑO in Guatemala and that the disputed domain name <casoavicola.com> is confusingly similar to AVICOLA VILLALOBOS as it contains the term "avicola", with the mere addition of the term "caso" (meaning "case" in Spanish).

The Complainants also underline that, considering the content of the website at the disputed domain name, the disputed domain name is clearly referred to the Complainants and specifically to a litigation in which the Complainants were involved.

With reference to rights or legitimate interests in respect of the disputed domain name, the Complainants state that the Respondent is not commonly known by the disputed domain name as he owns no trademark rights or unregistered rights for AVICOLA VILLALOBOS.

The Complainants underline that the Respondent was in no way authorized to use the Complainants' distinctive signs and state that the content of the website to which the disputed domain name resolves is aimed at attacking and damaging the reputation of the Complainants.

With reference to the circumstances evidencing bad faith, the Complainants indicate that the Respondent registered the disputed domain name primarily for the purpose of disrupting the business of the Complainants by maliciously exposing a litigation with the Complainants.

The Complainants emphasize that the content of the website reflects that the Respondent had full knowledge of the market positioning and popularity of the Complainants' commercial name, tradenames and trademarks and submit that knowing such facts, the Respondent exposed, with unnecessary details, litigation cases involving the first Complainant, being aware of the negative impact that the content would cause on consumers and the public perception in the countries where they operate.

The Complainants underline that the Respondent has used the MOLINOS MODERNOS, ALIANSA, POLLO CAMPERO, DON POLLO trademarks owned by the second Complainant, as well as an image of the Complainants' stakeholders without any authorization.

The Complainants further submit that the Respondent engaged in copyright infringement by publishing an image of the Chairman of one of the divisions of the second Complainant taken from a website under his name.

The Complainants state the Respondent is the son of the other party in the judicial cases that are currently being held. Accordingly, the Respondent has a personal and economic intention to damage the image, recognition, and popularity of the Complainants and shareholders. If the Respondent were acting with good intentions, he would not have hidden his identity.

## **B. Respondent**

The Respondent denies the confusing similarity of the disputed domain name with the first Complainant's distinctive signs, highlighting that the word "avicola" is a generic word for "poultry" in Spanish, which can potentially be associated to a large industry not just to the first Complainant.

The Respondent further claims that, although the word "case" alludes to a series of litigation cases involving the Complainants, the use of the word "avicola" does not specifically refer to such entity but to the broad economic sector related to the production of poultry, since the website also includes information related to litigation cases even in other poultry sectors in general in the Central American region.

With reference to rights or legitimate interests in respect of the disputed domain name, the Respondent submits that, contrary to the Complainants' assertions, the use of the Complainants' trademarks on the website is made purely for informative reasons and that the content of the website consists of the compilation of public rulings on legal processes in which it has been involved.

The Respondent therefore contends that the use he has made of the disputed domain name to make available to users public judicial information amounts to nominative fair use.

The Respondent claims that it is highly unlikely that he intended to damage or harm the first Complainant's trade name considering: i) there is no elaboration of value judgments or opinions of the Respondent within the website, as the texts are limited to giving context about the failures or make objective reviews about its content; and ii) no reference is made to the quality or supply of services and products that are part of the Respondent's economic activity.

With reference to the circumstances evidencing bad faith, the Respondent denies all the Complainants' allegations stating that there is no proof that the Respondent's intent was to disrupt the Complainants' business in any way, since his website simply publishes information on a dispute in an objective way with the intent to inform the public in a journalistic manner.

The Respondent also submits that he did not intend to sell, rent or otherwise assign the disputed domain name to the Complainants nor to disrupt the Complainants' business; and that he did not register the

disputed domain name in order to prevent the Complainants from reflecting a mark in a corresponding domain name, considering the disputed domain name has nothing to do with the commercial name of the Complainants as it contains a generic name that could well be anything related to “poultry”.

Lastly, the Respondent underlines that even the use of the Complainants’ figurative marks cannot demonstrate the registration and use of the disputed domain name in bad faith, since they do not prove the real intent on the part of the Respondent to act in bad faith but simply serve as an informational element to the articles published therein.

## **6. Discussion and Findings**

### **6.1. Language of the Proceeding**

Pursuant to paragraph 11(a) of the Rules, “unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding”.

In the case at hand, the language of the Registration Agreement of the disputed domain name <casoavicola.com> is English.

The Complaint was filed in English, whilst the Response was filed in Spanish.

Based on the language of the registration agreement and considering the Respondent is based in Canada, where English is one of the two official languages, the Panel determines that the language of the proceeding and thus the language of this Decision be English.

However, since the Panel is fluent in Spanish, it has decided to accept the Respondent’s submission without requesting a translation in English in order to ensure i) that each of the Parties is given a fair opportunity to present its case and ii) that the administrative proceeding takes place with due expedition (paragraphs 10(b) and 10(c) of the Rules).

### **6.2 Discussion and Findings**

According to paragraph 15(a) of the Rules: “A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.” Paragraph 4(a) of the Policy directs that the Complainants must prove each of the following:

- (i) that the disputed domain name registered by the Respondent is identical or confusingly similar to a trademark or service mark in which the Complainants have rights;
- (ii) that the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) that the disputed domain name has been registered and is being used in bad faith.

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

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant’s trademark and the disputed domain names. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ([“WIPO Overview 3.0”](#)), section 1.7.

The Complainants in this case rely on the first Complainant's tradename and commercial name AVICOLA VILLALOBOS AV Y DISEÑO, asserting that the sign has acquired goodwill and recognition in the past 50 years, not only in Guatemala, but throughout Central America in connection with the Complainant's poultry business.

As stated in section 3.1 of the [WIPO Overview 3.0](#), "To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant's goods and/or services. Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (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. [...] Specific evidence supporting assertions of acquired distinctiveness should be included in the complaint; conclusory allegations of unregistered or common law rights, even if undisputed in the particular UDRP case, would not normally suffice to show secondary meaning".

The Panel notes that the Complainants have provided only evidence of registration of the first Complainant's company name AVICOLA VILLALOBOS AV Y DISEÑO and a screenshot of a website citing such company name. The Complainants have not, instead, submitted evidence showing their use of the sign AVICOLA on its own, either online or offline, apt to demonstrate that the sign has become a distinctive identifier which consumers associate with the Complainants' business and products.

Based on the available evidence of use for some 50 years, the Panel finds that the Complainants would be in a position to establish unregistered trademarks for purposes of the Policy in the combined term and design "AVICOLA VILLALOBOS AV Y DISEÑO". The question then would be if the disputed domain name is confusingly similar to the aforementioned term. In this regard, the Panel notes that the most distinctive part of the term "AVICOLA VILLALOBOS AV Y DISEÑO" is "Villalobos", whereas the disputed domain name is composed of two dictionary words "caso" and "avicola" ("case" and "poultry", in English). It is not clear to the Panel whether the disputed domain name composed by these two dictionary words is confusing similar to the Complainants' claimed mark; at the same time the Panel also notes that the evidence provided by the Complainants, show that the website to which the disputed domain name resolved, made brief references to the POLLO CAMPERO, DON POLLO, ALIANSA, and MOLINOS MODERNOS registered trademarks, over which the Complainants have rights, showing targeting of the Complainant. In light of the findings below however, the Panel need not make a final determination on the matter.

## **B. Rights or Legitimate Interests; Registered and Used in Bad Faith**

Considering i) the composition of the disputed domain name, encompassing the two dictionary terms "caso" and "avicola", which can be translated into English as "poultry case", and are thus not exclusively referable to the Complainants; ii) the contents of the website to which the disputed domain name resolves, which are focused on providing information on a litigation that actually occurred; and iii) the lack of evidence that the Respondent might have used the disputed domain name as a pretext for commercial gain or other such purposes for the Respondent's benefit, the Panel finds that the Respondent's use of the disputed domain name can be considered a legitimate noncommercial or fair use under the Policy. In this regard, the Panel also notes that the composition of the disputed domain name (to the extent it may even be considered confusingly similar to the claimed mark) does not falsely suggest affiliation with the Complainant. See sections 2.4 and 2.5 of the [WIPO Overview 3.0](#).

In view of the above, based on the records, the Respondent's registration and use of the disputed domain name also does not amount to bad faith under the Policy.

The above conclusions are reached without prejudice to the rights of the Complainants concerning the alleged copyright images published on the Respondent's website.

## 7. Decision

For the foregoing reasons, the Complaint is denied.

*/Luca Barbero/*

**Luca Barbero**

Sole Panelist

Date: August 9, 2023