

ADMINISTRATIVE PANEL DECISION

FACT Systems GmbH v. Marcel Thoma, Meritis AG
Case No. D2024-0529

1. The Parties

The Complainant is FACT Systems GmbH, Austria, represented by Konzett Kohlhaupt Folie Rechtsanwälte GmbH, Austria.

The Respondent is Marcel Thoma, Meritis AG, Switzerland, self-represented.

2. The Domain Name and Registrar

The disputed domain name <simgun.com> is registered with Ascio Technologies Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on February 5, 2024. On February 6, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On February 6, 2024, 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 (Unknown) and contact information in the Complaint. The Center sent an email communication to the Complainant on February 6, 2024, 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 February 7, 2024.

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 February 8, 2024. In accordance with the Rules, paragraph 5, the due date for Response was February 28, 2024. The Respondent sent an email communication to the Center on February 12, 2024, but did not submit any formal response. Accordingly, the Center notified the commencement of panel appointment process on February 29, 2024.

The Center appointed Willem J. H. Leppink as the sole panelist in this matter on March 6, 2024. 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 following facts have not been disputed, apart from a general unsubstantiated challenge by the Respondent.

The Complainant is the owner of the European Union trademark for the word mark SIMGUN for goods and services in 9, 25, 28, 35, 41, and 42, with registration number 007124605, with a filing date of July 25, 2008 and a registration date of December 1, 2009.

The disputed domain name was registered on July 12, 2007 and resolves to a website on which a company named Simgun GmbH is presenting and offering the same products as distributed by the Complainant.

Simgun GmbH went bankrupt and closed its business several months before the Complaint was filed. The bankruptcy was published on March 24, 2023. The business closure was published on June 15, 2023.

Simgun GmbH was entitled to use the SIMGUN trademark for distributing products under the license agreement of December 16, 2017 as licensee. Licensor was Riedesser & Pallhuber GmbH, which company was the Complainant's predecessor in the ownership of the SIMGUN trademark. The license agreement was terminated on December 15, 2022. The products distributed by Simgun GmbH under the license agreement were the same as the products distributed by the Complainant.

Shareholders and managing directors of Simgun GmbH were Mr. Patrick Riedesser (majority shareholder) and Mr. Marcel Thoma (minority shareholder), the Respondent.

5. Parties' Contentions

A. Complainant

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the disputed domain name.

Notably, the Complainant contends the following.

In the course of Simgun GmbH's bankruptcy proceedings it came to knowledge of the Complainant, that Simgun GmbH's former managing director and minority shareholder (the Respondent), without the consent and knowledge of the majority shareholder had transferred the disputed domain name just before Christmas 2019 to a third party, which later was confirmed to be the Respondent.

Thus, the Respondent (i) prevents the Complainant from reflecting the SIMGUN trademark in the disputed domain name, (ii) disrupts the business of the Complainant, and / or (iii) gained control over the disputed domain name without having any rights.

The bankrupt Simgun GmbH has no control over the disputed domain name and the associated email addresses, but enquiries from customers are still sent to the associated email addresses and thus, now, the Respondent, who can mislead said customers. The Respondent and/or its representative are either preparing their access to the market with competing products or they simply want to disrupt the Complainant's business. Either way the Respondent has no rights whatsoever in "Simgun".

B. Respondent

The Respondent replied briefly by email to the Complainant's contentions. The Respondent formally denies the contentions and specifically (i) that the disputed domain name was not transferred illegally but that this was done in agreement with the majority shareholder as a transfer code was required for this transfer, and this code was in the possession of the majority shareholder; (2) that the Respondent denies that the Complainant is the rightful owner of the disputed domain name; and (3) that the Respondent filed a criminal complaint against the Complainant for fraud, and that civil court proceedings are underway against the majority shareholder.

6. Discussion and Findings

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 name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)"), section 1.7.

The Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

The entirety of the mark is reproduced within the disputed domain name. Accordingly, the disputed domain name is identical to the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

The Panel finds the first element of the Policy has been established.

B. Rights or Legitimate Interests

In light of its decision under 6.C., the Panel will not discuss the second element.

C. Registered and Used in Bad Faith

In order for the Panel to establish the third element of the Policy, the Complainant must demonstrate that the Respondent was in bad faith when registering the disputed domain name, and is using the disputed domain name in bad faith. The burden of proof for establishing this is on the Complainant.

The Panel considers that based on the un rebutted facts before it, the disputed domain name must have been transferred to and registered in the name of the Respondent just before Christmas 2019. This was clearly long before the license agreement between Riedesser & Pallhuber GmbH and Simgun GmbH was terminated at the end of 2022 and long before Simgun GmbH went bankrupt in 2023.

At that time of the registration of the disputed domain name in the name of the Respondent, both the majority shareholder and the minority shareholder, who is also the Respondent, were shareholders of Simgun GmbH.

The Complainant and the Respondent do not agree on the question whether the transfer of the disputed domain name to the Respondent, was legitimate or not. Whether the transfer was legitimate or not will directly impact the question whether the Respondent was in bad faith when registering the disputed domain name.

The Panel notes that the Complainant has alleged that the minority shareholder (i.e., the Respondent), without the consent and knowledge of the majority shareholder, had transferred the disputed domain name. The Respondent has rebutted this by stating that the disputed domain name was not transferred illegally but

that this was done in agreement with the majority shareholder as a transfer code was required for this transfer, and this code was in the possession of the majority shareholder.

The Panel also notes that the Complainant has not provided any further evidence that the transfer of the disputed domain name to the Respondent was illegitimate, nor any evidence that the Respondent is misleading the public through the use of email addresses associated with the disputed domain name.

Given the unsubstantiated contentions by the Complainant and the also unsubstantiated rebuttal by the Respondent, the Panel finds that, nonetheless, on a balance and in light of the fact that the burden of proof of establishing of registration in bad faith is on the Complainant, the Complainant has failed to establish registration in bad faith.

The Panel notes that the administrative proceeding under the Policy is limited in scope to cases of “cybersquatting” and is not intended to resolve broader legal, corporate, or contractual disputes, particularly those that are not straightforward. A dispute between the Parties on the issue of whether the transfer of the disputed domain name to the Respondent was legitimate, would require a further in-depth analysis of the rights and obligations of the shareholders in Simgun GmbH vis-à-vis each other, and on what actually happened in 2019. The Panel is of the position that undertaking such an analysis is outside the limited scope of the Policy and declines to do so. Such dispute would be more appropriately addressed by the competent courts.

As registration in bad faith could not be established, the Panel will not discuss whether the disputed domain name was used in bad faith.

In conclusion, the Panel finds that the Complainant has not established the third element of the Policy.

7. Decision

For the foregoing reasons, the Complaint is denied.

/Willem J. H. Leppink/

Willem J. H. Leppink

Sole Panelist

Date: March 18, 2024