



## NATIONAL ARBITRATION FORUM

### DECISION

Superior Growers Supply, Inc. v. HOMEHARVESTS.COM  
Claim Number: FA0712001125171

#### PARTIES

Complainant is **Superior Growers Supply, Inc.** ("Complainant"), represented by **James R. Duby, Jr.** of **Duby & Associates**, Michigan, USA. Respondent is **HOMEHARVESTS.COM** ("Respondent"), Virginia, USA.

#### REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is **<homeharvests.com>**, registered with **Namesdirect**.

#### PANEL

The undersigned certifies that she has acted independently and impartially and that to the best of her knowledge she has no known conflict in serving as Panelist in this proceeding. Hon. Carolyn Marks Johnson sits as Panelist.

#### PROCEDURAL HISTORY

Complainant submitted a Complaint to the National Arbitration Forum electronically December 28, 2007; the National Arbitration Forum received a hard copy of the Complaint December 31, 2007.

On December 31, 2007, Namesdirect confirmed by e-mail to the National Arbitration Forum that the **<homeharvests.com>** domain name is registered with Namesdirect and that Respondent is the current registrant of the name. Namesdirect verified that Respondent is bound by the Namesdirect registration agreement and thereby has agreed to resolve domain-name disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On January 14, 2008, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of February 4, 2008, by which Respondent could file a response to the Complaint, was transmitted to Respondent via e-mail, post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts, and to [postmaster@homeharvests.com](mailto:postmaster@homeharvests.com) by e-mail.

Having received no response from Respondent, the National Arbitration Forum transmitted to the parties a Notification of Respondent Default.

On February 11, 2008, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the National Arbitration Forum appointed Hon. Carolyn Marks Johnson as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that the National Arbitration Forum discharged its responsibility under Paragraph 2(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") "to employ reasonably available means calculated to achieve actual notice to Respondent." Therefore, the Panel may issue its decision based on the documents submitted and in accordance with the ICANN Policy, ICANN Rules, the National Arbitration Forum's Supplemental Rules and any rules and principles of law that the Panel deems applicable, without the benefit of any response from

Respondent.

## RELIEF SOUGHT

Complainant requests that the domain name be transferred from Respondent to Complainant.

## PARTIES' CONTENTIONS

A. Complainant makes the following assertions:

1. The domain name that Respondent registered, <**homeharvests.com**>, is confusingly similar to Complainant's HOME HARVEST mark.
2. Respondent has no rights to or legitimate interests in the <**homeharvests.com**> domain name.
3. Respondent registered and used the <**homeharvests.com**> domain name in bad faith.

B. Respondent failed to submit a Response in this proceeding.

## FINDINGS

Complainant, Superior Growers Supply, Inc., is a supplier of gardening products. Complainant markets its products under the HOME HARVEST mark, and registered the mark with the United States Patent and Trademark Office ("USPTO") September 26, 1989 (Reg. No. 1,558,589). Complainant markets its products from the website that resolves from the <homeharvest.com> domain name.

Respondent registered the <**homeharvests.com**> domain name October 5, 2007. The disputed domain name is being used to divert Internet users to the <brecks.com> website, which promotes the sale of gardening supplies and accessories.

## DISCUSSION

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Given Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of Complainant's undisputed representations pursuant to paragraphs 5(e), 14(a) and 15(a) of the Rules and will draw such inferences as the Panel considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory. *See Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc.*, FA 95095 (Nat. Arb. Forum July 31, 2000) (holding that the respondent's failure to respond allows all reasonable inferences of fact in the allegations of the complaint to be deemed true); *see also Talk City, Inc. v. Robertson*, D2000-0009 (WIPO Feb. 29, 2000) ("In the absence of a response, it is appropriate to accept as true all allegations of the Complaint.").

Paragraph 4(a) of the Policy requires Complainant to prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

- (1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (2) Respondent has no rights or legitimate interests in respect of the domain name; and
- (3) the domain name has been registered and is being used in bad faith.

### **Identical to and/or Confusingly Similar**

The Panel finds that Complainant's registration of its HOME HARVEST mark with the USPTO established Complainant's rights to the mark pursuant to Policy ¶ 4(a)(i). *See Innomed Techs., Inc. v. DRP Servs.*, FA

221171 (Nat. Arb. Forum Feb. 18, 2004) (“Registration of the NASAL-AIRE mark with the USPTO establishes Complainant's rights in the mark.”); *see also Janus Int’l Holding Co. v. Rademacher*, D2002-0201 (WIPO Mar. 5, 2002) (“Panel decisions have held that registration of a mark is *prima facie* evidence of validity, which creates a rebuttable presumption that the mark is inherently distinctive.”).

The disputed domain name incorporates Complainant’s entire HOME HARVEST mark, merely adding an “s” to the end of the mark and including the generic top-level domain (“gTLD”) “.com.” These factors, however, do not make the disputed domain name distinctive from the registered mark. First, in *National Geographic Society v. Stoneybrook Investors*, FA 96263 (Nat. Arb. Forum Jan. 11, 2001), the panel found that the domain name <nationalgeographics.com> was confusingly similar to the complainant’s NATIONAL GEOGRAPHIC mark because the disputed domain name differed only by the addition of an “s.” Second, all domain names are required to have a top-level domain, therefore, the addition of the gTLD “.com” does not make the disputed domain name distinctive from the HOME HARVEST mark. The Panel finds that the disputed domain name is thus confusingly similar to Complainant’s mark pursuant to Policy ¶ 4(a)(i). *See Rollerblade, Inc. v. McCrady*, D2000-0429 (WIPO June 25, 2000) (finding that the top level of the domain name such as “.net” or “.com” does not affect the domain name for the purpose of determining whether it is identical or confusingly similar).

The Panel finds that Complainant satisfied Policy ¶ 4(a)(i).

### **Rights to or Legitimate Interests**

Complainant is responsible for meeting the initial burden under Policy ¶ 4(a)(ii) by making a *prima facie* case that Respondent lacks all rights and legitimate interests in the disputed domain name. Here, the Panel finds that Complainant’s assertion met the burden, and therefore, the burden shifts to Respondent to show that it does have rights or legitimate interests under Policy ¶ 4(a)(ii). *See Compagnie Generale des Matieres Nucleaires v. Greenpeace International*, D2001-0376 (WIPO May 14, 2001) (“Proving that the Respondent has no rights or legitimate interests in respect of the Domain Name requires the Complainant to prove a negative. For the purposes of this sub paragraph, however, it is sufficient for the Complainant to show a *prima facie* case and the burden of proof is then shifted on to the shoulders of Respondent. In those circumstances, the common approach is for respondents to seek to bring themselves within one of the examples of paragraph 4(c) or put forward some other reason why they can fairly be said to have a relevant right or legitimate interests in respect of the domain name in question.”); *see also Clerical Med. Investment Group Ltd. v. Clericalmedical.com*, D2000-1228 (WIPO Nov. 28, 2000) (finding that, under certain circumstances, the mere assertion by the complainant that the respondent has no right or legitimate interest is sufficient to shift the burden of proof to the respondent to demonstrate that such a right or legitimate interest does exist).

Respondent did not respond to the Complaint, and in such circumstances, the Panel is permitted to draw inferences, including a presumption that Respondent has neither rights nor legitimate interests in the <homeharvests.com> domain name. *See Talk City, Inc. v. Robertson*, D2000-0009 (WIPO Feb. 29, 2000) (“[Rule 14(b)] expressly provide[s] that the Panel ‘shall draw such inferences’ from the Respondent’s failure to comply with the rules ‘as it considers appropriate.’”); *see also Charles Jourdan Holding AG v. AAIM*, D2000-0403 (WIPO June 27, 2000) (finding it appropriate for the panel to draw adverse inferences from the respondent’s failure to reply to the complaint). Nevertheless, the Panel will consider all evidence in the record to determine if Respondent has rights or legitimate interests under Policy ¶ 4(c).

The panel in *Gallup, Inc. v. Amish Country Store*, FA 96209 (Nat. Arb. Forum Jan. 23, 2001) found that the respondent did not have rights in a domain name when the respondent was not known by the mark. Here, the WHOIS information does not indicate that Respondent is commonly known by the disputed domain name. Furthermore, the disputed domain name is being used to redirect Internet users to the <brecks.com> website. Finally, Complainant has asserted that Respondent has never been authorized or licensed to use the HOME HARVEST mark. Accordingly, the Panel finds that Respondent is not commonly known by the disputed domain name under Policy ¶ 4(c)(ii). *See Am. W. Airlines, Inc. v. Paik*, FA 206396 (Nat. Arb. Forum Dec. 22, 2003) (“Respondent has registered the domain name under the name ‘Ilyoup Paik a/k/a David Sanders.’ Given the WHOIS domain name registration information, Respondent is not commonly known by the

[<awvacations.com>] domain name.”).

Respondent’s use of the disputed domain name to redirect Internet users to the <brecks.com> website, where competing gardening products and supplies are sold, is not a *bona fide* offering of goods or services under Policy ¶ 4(c)(i), nor a legitimate noncommercial or fair use under Policy ¶ 4(c)(iii). In *DLJ Long Term Investment Corp. v. BargainDomainNames.com*, FA 104580 (Nat. Arb. Forum Apr. 9, 2002), the respondent was using the domain name to divert Internet users to a website where services that competed with the complainant were advertised; the panel concluded that the respondent was not using the disputed domain name in connection with a *bona fide* offering of goods and services. Similarly, here, the Panel concludes that Respondent’s use does not demonstrate rights or legitimate interests in the <homeharvests.com> domain name. See *Ameritrade Holdings Corp. v. Polanski*, FA 102715 (Nat. Arb. Forum Jan. 11, 2002) (finding that the respondent’s use of the disputed domain name to redirect Internet users to a financial services website, which competed with the complainant, was not a *bona fide* offering of goods or services).

The Panel finds that Complainant satisfied Policy ¶ 4(a)(ii).

### **Registration and Use in Bad Faith**

The Panel finds that using a disputed domain name that incorporates a competitor’s entire mark with nominal changes, evidences registration and use in bad faith. In *EthnicGrocer.com, Inc. v. Latingrocer.com*, FA 94384 (Nat. Arb. Forum July 7, 2000), the panel found bad faith where the respondent’s sites passed users through to the respondent’s competing business. Here, the disputed domain name passes Internet users through to the <brecks.com> website where products similar to those Complainant offers are sold. Such use also permits the inference that Respondent likely benefits commercially from such diversion by those seeking Complainant. Therefore, the Panel finds that Respondent’s conduct demonstrates registration and use in bad faith by disrupting the business of a competitor pursuant to Policy ¶ 4(b)(iii). See *Puckett, Individually v. Miller*, D2000-0297 (WIPO June 12, 2000) (finding that the respondent has diverted business from the complainant to a competitor’s website in violation of Policy ¶ 4(b)(iii)).

Finally, Respondent’s use of the <homeharvests.com> domain name also demonstrates an intention to attract Internet users to its website for commercial gain, and is capable of creating confusion with the HOME HARVEST mark as to the source, sponsorship, affiliation, or endorsement of the <brecks.com> website, to which Internet users seeking Complainant are diverted. The Panel finds that Respondent’s use demonstrates registration and use in bad faith pursuant to Policy ¶ 4(b)(iv). See *Computerized Sec. Sys., Inc. v. Hu*, FA 157321 (Nat. Arb. Forum June 23, 2003) (finding that the respondent’s use of the <saflock.com> domain name to offer goods competing with the complainant’s illustrates the respondent’s bad faith registration and use of the domain name, evidence of bad faith registration and use pursuant to Policy ¶ 4(b)(iv)); see also *TM Acquisition Corp. v. Carroll*, FA 97035 (Nat. Arb. Forum May 14, 2001) (finding bad faith where the respondent used the domain name, for commercial gain, to intentionally attract users to a direct competitor of the complainant).

The Panel finds that Complainant satisfied Policy ¶ 4(a)(iii).

## **DECISION**

Having established all three elements required under the ICANN Policy, the Panel concludes that relief shall be **GRANTED**.

Accordingly, it is Ordered that the <homeharvests.com> domain name be **TRANSFERRED** from Respondent to Complainant.

Hon. Carolyn Marks Johnson, Panelist  
Dated: February 25, 2008.

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