



**(Hong Kong Office)**

**ADMINISTRATIVE PANEL DECISION**

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<b>Case No.</b>	HK-2301768
<b>Complainant:</b>	Imiracle (ShenZhen) Technology Co., Ltd.
<b>Respondent:</b>	Muhammad Kothawala
<b>Disputed Domain Name(s):</b>	<podkingelfbar.com>

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**1. The Parties and Contested Domain Name**

The Complainant is Imiracle (ShenZhen) Technology Co., Ltd, of Room 1606, Office Building T5, Qianhai China Resources Financial Center, No. 5035 Menghai Avenue, Nanshan Street, Qianhai Hong Kong-Shenzhen Cooperation Zone, Shenzhen, Guangdong Province, China.

The Respondent is Muhammad Kothawala of 18035 Billabong Crescent Ct, Cypress, Texas, US.

The domain name at issue is <podkingelfbar.com> (“the Domain Name”), registered by the Respondent with GoDaddy.com LLC, of 14455 North Hayden Road Suite 219 Scottsdale, AZ 85260.

**2. Procedural History**

On 19 June 2023, the Complainant filed a Complaint with the Hong Kong Office of Asian Domain Name Dispute Resolution Centre (“ADNDRC”), pursuant to the Uniform Domain Name Dispute Resolution Policy (“Policy”) approved by the Internet Corporation for Assigned Names and Numbers (“ICANN”) on 24 October 1999, the Rules for Uniform Domain Name Dispute Resolution Policy (“Rules”), approved by ICANN Board of Directors on 28 September 2013 and the ADNDRC Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (“Supplemental Rules”) effective from 31 July 2015. The Complainant chose to have a sole panelist to handle the dispute.

On 19 June 2023, the ADNDRC transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On 21 June 2023, the Registrar transmitted by email to the ADNDRC its verification response confirming that the Respondent is listed as the registrant and providing the contact details. On the same day, the ADNDRC notified the Complainant of the deficiencies in the Complaint. Later that day, the Complainant filed a rectified Complaint. The ADNDRC formally notified the Respondent of the Complaint and the proceedings commenced on 27 June 2023. The

ADNDRC did not receive any formal response from the Respondent within 20 calendar days as required under paragraph 5 of the Rules. Accordingly, on 18 July 2023, the ADNDRC informed the parties that no response has been received and it would shortly appoint a single panelist.

On 26 July 2023, the ADNDRC appointed Ms. Karen Fong as sole Panelist in this matter. The Panelist accepted the appointment and has submitted a statement to the ADNDRC that she is able to act independently and impartially between the parties.

### **3. Factual background**

The Complainant, based in China is an e-cigarette company established in 2007. Headquartered in Shenzhen, it has branches in Shanghai, Hong Kong, the United States, Ireland, Germany and other places.

The Complainant's products are sold under the brand ELFBAR. It has trade mark registrations for ELFBAR under Chinese Trade Mark Registrations No. 47304567 registered on February 21, 2021 and Chinese Trade Mark Registrations No. 54149297 registered on 28 September 2021 (individually and collectively, the "Trade Mark"). The Complainant's main website is connected to the domain name <elfbar.com>.

The trade mark 'podking' is the brand of a competitor e-cigarette company.

The Respondent registered the Domain Name on November 30, 2022. The Domain Name resolves to a website which bears the Trade Mark and logo and offers for sale products purported to be made by the Complainant bearing the Trade Mark as well as 'podking' branded products and other third party e-cigarettes (the "Website").

### **4. Parties' Contentions**

#### **A. Complainant**

The Complainant's contentions may be summarized as follows:

The Domain Name is identical or confusingly similar to the Trade Mark, that the Respondent has no rights or legitimate interests with respect to the Domain Name, and that the Domain Name has been registered and is being used in bad faith. The Complainant requests transfer of the Domain Name.

#### **B. Respondent**

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

### **5. Findings**

#### **A. General**

The Policy provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail:

- i. The Respondent's domain name is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- ii. The Respondent has no rights or legitimate interests in respect of the domain name; and
- iii. The Respondent's domain name has been registered and is being used in bad faith.

## **B. Identical / Confusingly Similar**

The Panel is satisfied that the Complainant has established that it has rights to the Trade Mark.

The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the trade mark and the domain name to determine whether the domain name is confusingly similar to the trade mark. The test involves a side-by-side comparison of the domain name and the textual components of the relevant trade mark to assess whether the mark is recognizable within the domain name.

In this case the Domain Name contains the Trade Mark in its entirety plus the trade mark 'podking' which belongs to a third party. Where the complainant's trade mark is recognizable within the disputed domain name, the addition of other third – party marks is insufficient in itself to avoid a finding of confusing similarity to the complainant's mark under the first element. (See Section 1.12 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition - "WIPO Overview 3.0").

For the purposes of assessing identity or confusing similarity under paragraph 4(a)(i) of the Policy, it is permissible for the Panel to ignore the generic Top-Level Domain which in this case is ".com". It is viewed as a standard registration requirement.

The Panel finds that the Domain Name is confusingly similar to trade marks in which the Complainant has rights and that the requirements of paragraph 4(a)(i) of the Policy therefore are fulfilled.

## **C. Rights or Legitimate Interests**

Pursuant to paragraph 4(c) of the Policy, a respondent may establish rights or legitimate interests in the disputed domain name by demonstrating any of the following:

- (i) before any notice to it of the dispute, the respondent's 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) the respondent has been commonly known by the domain name, even if it has acquired no trade mark or service mark rights; or
- (iii) the respondent is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain, to misleadingly divert consumers, or to tarnish the trade mark or service mark at issue.

Although the Policy addresses ways in which a respondent may demonstrate rights or legitimate interests in a disputed domain name, it is well established that, as it is put in section 2.1 of the WIPO Overview 3.0 that a complainant is required to make out a prima

facie case that the respondent lacks rights or legitimate interests. Once such prima facie case is made, the burden of production shifts to the respondent to come forward with appropriate allegations or evidence demonstrating rights or legitimate interests in the domain name. If the respondent does come forward with some allegations of evidence of relevant rights or legitimate interests, the panel weighs all the evidence, with the burden of proof always remaining on the complainant.

The Complainant submits that the Respondent is not an authorized distributor or partner of the Complainant or in any way connected or affiliated with the Complainant. The Respondent has not been authorized by the Complainant to make any use of the Trade Mark in the Domain Name or in any other way. The Respondent does not appear to be known by the Domain Name or own any trade mark rights in the Domain Name.

The Panel finds that the Complainant has made out a prima facie case, a case calling for an answer from the Respondent. The Respondent has not provided any reasons why he chose to register the Domain Name comprising a trade mark with which he has no connection. The Respondent's unauthorized use of the Trade Mark in the Domain Name in relation to a website purporting to be authorized by the Complainant is not a bona fide offering of goods or services or legitimate noncommercial or fair use of the Domain Name. The Panel is unable to conceive of any basis upon which the Respondent could sensibly be said to have any rights or legitimate interests in respect of the Domain Name.

The Panel finds that the Respondent has no rights or legitimate interests in respect of the Domain Name.

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

To succeed under the Policy, the Complainant must show that the Domain Name has been registered and is being used in bad faith.

The Panel is satisfied that the Respondent must have been aware of the Complainant's trade mark when he registered the Domain Name. It is implausible that he was unaware of the Complainant when he registered the Domain Name especially since the Website displays the Trade Mark, and the products offered for sale are branded ELFBAR products.

In the WIPO Overview 3.0, section 3.2.2 states as follows:

“Noting the near instantaneous and global reach of the Internet and search engines, and particularly in circumstances where the complainant's mark is widely known (including in its sector) or highly specific and a respondent cannot credibly claim to have been unaware of the mark (particularly in the case of domainers), panels have been prepared to infer that the respondent knew, or have found that the respondent should have known, that its registration would be identical or confusingly similar to a complainant's mark. Further factors including the nature of the domain name, the chosen top-level domain, any use of the domain name, or any respondent pattern, may obviate a respondent's claim not to have been aware of the complainant's mark.”

The above together with the fact that there is a clear absence of rights or legitimate interests coupled with no credible explanation for the Respondent's choice of the Domain Name are also significant factors to consider. The Panel finds that the Respondent's registration is in bad faith.

The Domain Name is also being used in bad faith. The content of the Website is calculated to give the impression that it has been authorized by or connected to the Complainant as well as give the impression that it is somehow connected to the 'podking' brand when this is not the case. The Website was set up for the commercial benefit to the Respondent without authorisation from the Complainant. It is highly likely that Internet users when typing the Domain Name into their browser or finding them through a search engine would have been looking for a site operated by the Complainant rather than the Respondent.

The Domain Name is likely to confuse Internet users trying to find the Complainant's official website. Such confusion will inevitably result due to the incorporation of the Trade Mark as the most prominent element of the Domain Name. The Respondent employs the fame of the Trade Mark to mislead Internet users into visiting the website connected to the Domain Name instead of the Complainant's.

The Website was set up to deliberately mislead Internet users that it is connected to, authorised by or affiliated with the Complainant. From the above, the Panel concludes that the Respondent intentionally attempted to attract, for commercial gain, Internet users to the Respondent's Website by misleading Internet users into believing that the Respondent's website is authorised or somehow connected to the Complainant.

The Panel therefore also concludes that the Domain Name was registered and is being used in bad faith under paragraph 4(b)(iv) of the Policy.

Therefore, the Complainant has satisfied the third element of the Policy.

## 6. Decision

For the foregoing reasons, and in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name <podkingelfbar.com> be transferred to the Complainant.

A handwritten signature in cursive script, appearing to read 'Karen Fong', is written above a solid horizontal line.

Karen Fong  
Panelist

Dated: August 9, 2023