COMPLAINANT: VAT-TECH Inc. and VAX-D Manufacturing USA LLC

38549 US Highway 19 North
Palm Harbor, FL 34684
Telephone: 727-943-1002
Fax: 727-943-9899
E-mail: larry@vaxd.com

vs.

RESPONDENT: Community Back Centres, Inc.

1811 Victoria Street, #202
Prince George, British Columbia
Canada, V2L 2L6
Telephone: 250-562-0777
Fax: 250-563-3177
E-mail: emsky@vax-d.com

Before Paul C. Van Slyke, Arbitrator

PROCEDURAL HISTORY

The Complaint was filed with CPR and after review for administrative compliance, served on the Respondent on November 4, 2002. The Respondent filed a Response. I was appointed Arbitrator pursuant to the Uniform Domain Name Dispute Resolution Policy (“UDRP”) and Rules promulgated by the Internet Corporation for Domain Names and Numbers (ICANN). Upon the written submitted record including the Complaint, the Response, and an additional submission by the Complainant, I find as follows:

FINDINGS

Respondent’s registered domain name, vax-d.com was registered with Tucows, Inc. on March 16, 1996. In registering the name, Respondent agreed to submit to this forum to resolve any dispute concerning the domain name, pursuant to the UDRP.

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

i. Respondent’s domain name is identical or confusingly similar to a trademark or service mark in which complainant has rights; and

ii. Respondent has no rights or legitimate interests in respect of the domain name; and

iii. Respondent’s domain name has been registered and is being used in bad faith.

IDENTITY/CONFUSING SIMILARITY: Complainant alleges that vax-d.com is identical or confusingly similar to Complainant’s trademark, VAX-D, USPTO registration number 1,783,999 which applies to services in international class 42 for therapeutic services for the treatment of the lumbar area of a patient involving application of a decompression load to relieve back pain and disability.

Complainant has offered proof of Complainant’s trademark rights in the VAX-D trademark. It is well documented that the
addition of the top-level domain indicator does not make a domain name significantly different than the trademark it is based upon. See Shirmax Retail Ltd. V. CES Marketing Group, Inc., (eRes. Case No. AF-0104).

I therefore conclude that the registered domain name is identical or confusingly similar to Complainant’s protected mark.

RIGHTS AND LEGITIMATE INTERESTS: Complainant alleges that Respondent has no rights or legitimate interests with respect to the domain name at issue. In support of this allegation, Complainant asserts that Respondent purchased several pieces of VAX-D equipment and was allowed to use the VAX-D trademark in conjunction with the treatment of patients on the equipment. Complainant further asserts that Respondent breached the purchase contract between the two parties and began marketing and selling a product directly competitive to the VAX-D technology. Complainant further claims that Respondent is using the domain name to cause confusion in the market place, advertise competitive services and to attract potential customers of Complainant to Respondent’s site to “bait and switch” the potential customers into purchasing Respondent’s competing product.

Respondent, however, states that its registration of the disputed domain name was done with the full knowledge and consent of the Complainant. Respondent asserts that at the time of registration Complainant had contracted the sales and marketing of the VAX-D equipment, to National Spine Institute, Inc. (“National Spine”) (not a party to this dispute). Respondent asserts that National Spine handled the exclusive worldwide sales and distribution of the VAX-D equipment for the Complainant. Respondent asserts that Respondent requested and received permission to register the disputed domain name from National Spine, who, in turn discussed the request with the Complainant. Respondent included a copy of the document from National Spine explicitly granting Respondent the right to use the disputed domain name.

Complainant, in an additional submission, disputes the right of National Spine to grant Respondent the license to use the disputed domain name stating that the grant of the license was in direct violation of the contract between Complainant and National Spine. Complainant also indicated that while Complainant had contracted with National Spine in the past, that relationship has since been severed.

This issue and the facts are complicated. Complainant’s assertions directly conflict with Respondent’s arguments. The presence and role of National Spine further works to exacerbate a murky factual analysis. To reach a conclusion on this issue, it is necessary to point out that the burden of clarifying this issue lies with the Complainant. In an arbitration proceeding under the UDRP, the complainant, the party seeking to overturn the status quo, has the burden of proving all three factors of the test listed above.

In the present case Complainant has made several assertions regarding Respondent’s registration of the disputed domain name and has also asserted several arguments to refute Respondent’s claim that Complainant was aware of the Respondent’s registration. The problem for Complainant is that assertions do not function as proof unless they are supported by evidence. The documents presented by Complainant do not prove that Respondent had no claim or legitimate interest in the domain name. Due to the limited scope of a UDRP proceeding, there is no process for factual discovery that involves the analysis of contractual breaches or the give and take argument designed to uncover latent facts about complicated business relationships gone awry. Without better evidence of the facts surrounding these business relationships, Complainant cannot prevail.

I therefore conclude that the Complainant failed to provide evidence sufficient to prove Respondent’s lack of rights or a legitimate interest in the domain name.

BAD FAITH: As stated above, as the UDRP requires a Complainant to sufficiently prove all three factors required by the policy and because the Complainant has failed to prove the second factor, it is unnecessary to discuss the last factor, that of bad faith.

CONCLUSION

In light of my findings above that the registered domain name is identical or confusingly similar to Complainant’s protected mark, but because Complainant has failed to prove that Respondent does not have rights or legitimate interests with respect to the domain name at issue, I find in favor of the Respondent.
REMEDY

Complainant’s request to transfer the domain name vax-d is hereby DENIED.

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Signature of Arbitrator        Date