

## ADMINISTRATIVE PANEL DECISION

Ferm-O-Feed B.V. v. Domain Manager, eWeb Development Inc.  
Case No. D2018-1112

### 1. The Parties

The Complainant is Ferm-O-Feed B.V. of Schijndel, Netherlands, represented by Novagraaf Nederland B.V., Netherlands.

The Respondent is Domain Manager, eWeb Development Inc. of Richmond, British Columbia, Canada, represented by Muscovitch Law P.C., Canada.

### 2. The Domain Name and Registrar

The disputed domain name <fertiplus.com> is registered with Alpine Domains Inc. (the “Registrar”).

### 3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 17, 2018. On May 17, 2018, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 18, 2018, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that 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 May 23, 2018. In accordance with the Rules, paragraph 5, the due date for Response was June 12, 2018. On May 30, 2018, the Respondent requested an extension of time for filing the Response. In accordance with the Rules, paragraph 5(b), the Respondent was granted an automatic four calendar day extension for the Response, and the due date for the Response was updated to June 16, 2018.

The Respondent’s attorneys emailed the Complainant’s agent on June 4, 2018, warning that it would be seeking a finding of Reverse Domain Name Hijacking (“RDNH”) if the Complainant did not withdraw its

Complaint and noting, amongst other things, that the Complaint did not include all material correspondence between the Parties.

The Response was filed with the Center June 16, 2018.

On June 7, 2018, the Complainant submitted an unsolicited supplemental filing, consisting of the above email from the Respondent's attorneys of June 4, 2018, together with a quote enquiry response email sent to the Complainant on July 29, 2017.

The Center appointed Adam Taylor, Willem J. H. Leppink and The Hon Neil Brown Q.C. as panelists in this matter on July 18, 2018. The Panel finds that it was properly constituted. Each member of 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 Complainant has supplied organic fertilizer under the mark "Fertiplus" for some 15 years.

The Complainant owns a number of registered trade mark for FERTIPLUS including EU trade mark no. 12839932, filed May 2, 2014, and registered October 16, 2014, in class 1 and international registration no. 557519 (designating France, Germany, Greece and Italy), registered on July 18, 1990, in class 1.

The disputed domain name was registered on August 16, 2013.

On September 12, 2017, the Complainant emailed a purchase enquiry to the Respondent using a pseudonym. The following day, the enquirer submitted an online quote request, in the course of which the enquirer asserted (in respect to standard questions) that it was not connected with a trade mark holder. Thereafter, the enquirer was provided with a quote for USD 19,750.

On October 13, 2017, the Complainant (openly) emailed the Respondent saying that the Respondent had been in contact with the writer's colleague about the disputed domain name and requesting a "serious price" to buy the disputed domain name.

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

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

The following is a summary of the Complainant's contentions:

The disputed domain name fully incorporates the Complainant's trade mark.

The Respondent lacks rights or legitimate interests in the disputed domain name.

To the best of the Complainant's knowledge, the Respondent owns no trade mark rights in the name "Fertiplus". The Complainant has not authorised the Respondent to use its mark in the disputed domain name otherwise.

To the best of the Complainant's knowledge, the disputed domain name has not been used for a *bona fide* offering of goods or services.

The Respondent is not using the disputed domain name for a legitimate and noncommercial purpose. On the contrary, the Respondent has offered the disputed domain name for sale to the Complainant at ever-increasing prices.

The disputed domain name was registered and used in bad faith.

The disputed domain name was registered many years after the Complainant first registered its first "Fertiplus" trade mark.

The Respondent is a domain name trader and registered the disputed domain name for sale to the owner of the "Fertiplus" trade mark.

The Respondent ultimately offered the disputed domain name to the Complainant for USD 17,500.

The Respondent registered the disputed domain name to "exploit the content" of the disputed domain name for commercial advantage through advertising, sale or otherwise. It is difficult to see how this could be done legitimately.

## **B. Respondent**

The following is a summary of the Respondent's contentions:

The Respondent does not dispute that the Complainant has trade mark rights in the term "Fertiplus" and that it has satisfied the low-threshold first element of the Policy.

The Respondent possesses rights or legitimate interests in the disputed domain name. The Complainant's allegations in this respect are skeletal.

The Respondent lawfully registers non-infringing domain names and sells these to customers, with or without a website development package.

The Respondent registered the disputed domain name because it was a "made-up" word that lent itself to being adopted as a new brand by someone wanting an online presence. It is composed of a short form for "fertility" and the word, "plus", denoting something extra or special, or particularly good, and as such is a combination of two ordinary terms, rather than something particularly novel or particularly unique.

Both before and after registration of the disputed domain name, the Respondent registered numerous other permutations involving the respective terms, "fert" or "plus". For example, the Respondent has registered <fertus.com>, <ferteco.com>, <caterplus.com>, <cosmoplus.com>, <coastalplus.com>, <instaplus.com>, <sunnyplus.com>.

The Complainant knows that the Respondent has used the disputed domain name for a *bona fide* offering as the Complainant contacted the Respondent to buy the Respondent's goods and services.

Before notice of the dispute, the Respondent used the disputed domain name for a *bona fide* offering, namely its branding and website development business. The Respondent conceived of and registered the disputed domain name, believing that it may in the future be of interest to a customer of the Respondent who would retain the Respondent to develop and host it, or that the Respondent would itself develop a website for the disputed domain name.

The Respondent's business model has been determined to be a *bona fide* use of a domain name in other UDRP cases against the Respondent.

The Respondent did not register or use the disputed domain name in bad faith.

The Complaint contains no information about the Complainant aside from its ownership of registered trade marks. The evidence supplied with the Complaint is an assortment of documents which are unexplained, and most of which are untranslated and/or undated. They do not demonstrate that the Complainant had any

particular reputation in 2013 when the disputed domain name was registered, let alone outside its specialist industry. The dated evidence pre-2013 is minimal.

The Complainant's registered trade marks suggest that its business was limited to Benelux, France, Germany, Greece and Italy until at least 2014, after registration of the disputed domain name. The Complainant owns no registered trade mark in Canada or the United States.

Archive versions of the Complainant's website show that, until 2014, its primary brand was "Fermofeed", rather than "Fertiplus".

The Complainant has no monopoly over the term. Many different companies and organisations worldwide have been using the name and mark "Fertiplus", both before and after registration of the disputed domain name, including a major company founded in 1999 in the Netherlands, where the Complainant is located.

Accordingly, there is no evidence that the Respondent registered the disputed domain name for sale to the Complainant. Indeed, the evidence points to the Respondent's lack of awareness of the Complainant's registration of the disputed domain name and to registration of the disputed domain name as part of the Respondent's long-standing and legitimate branding and website development business.

There is no evidence of any reputation of the Complainant in Canada.

The Respondent is not obliged to search the records of foreign trade mark offices.

There is no evidence that the value of the disputed domain name is exclusively derived from the Complainant's little-known trade mark. Indeed, all the evidence points to numerous parties, new and old, all sharing an interest in the mark, with no one party entitled to exclusivity or a monopoly.

The Complaint included only a fragment of the correspondence between the Parties. When challenged, the Complainant submitted an additional fragment but still presented an incomplete and inaccurate version of events.

The Complainant contacted the Respondent to buy the disputed domain name, not the other way round as suggested by the Complainant. The Complainant made false representations to elicit the quote. The Complainant did not reference or rely on a trade mark. Unhappy with the price, the Complainant brought this case as a "Plan B".

The Respondent's offer in response to the purchase enquiry by a person not asserting rights in the disputed domain name was not bad faith. As a lawful registrant, the Respondent has the right to sell it for whatever price it deems appropriate, regardless of the Complainant's valuation.

The terms of quote accepted by the enquirer on behalf of the Complainant provided that a false representation of no claim to the disputed domain name justified a finding of RDNH.

The Complainant is guilty of RDNH. The Complainant was well aware that the disputed domain name formed part of Respondent's stock in trade and that the Respondent was legitimately engaged in the business of branding and website development, having visited Respondent's site and having even requested a quote. Instead of negotiating in good faith, the Complainant brought this Complaint without any evidence of targeting or awareness of Complainant at the time of registration of the disputed domain name. The Complainant self-servingly failed to disclose material evidence which was detrimental to its tenuous case and revealed it to be deceitful. Even after being warned of RDNH by letter, the Complainant again failed to disclose all material evidence.

## **6. Discussion and Findings**

### **A. Supplemental Filing**

The Complainant has made an unsolicited supplemental filing.

Section 4.6 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“WIPO Overview 3.0”) states that UDRP panels have repeatedly affirmed that the party submitting an unsolicited supplemental filing should clearly show its relevance to the case and why it was unable to provide the information contained therein in its complaint or response, e.g., owing to some “exceptional” circumstance.

In this case, the Panel has decided to admit the filing because it is based on a communication which occurred after the Complaint was filed and because it is relevant to the Panel’s consideration of RDNH. The content of the supplemental filing is set out in section 3 above.

### **B. Identical or Confusingly Similar**

It is not in dispute that the Complainant has established rights in the name “Fertiplus” by virtue of its registered trade marks and that the disputed domain name is identical thereto.

The Panel therefore finds that the Complainant has established the first element of paragraph 4(a) of the Policy.

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

It is unnecessary to consider this element in light of the Panel’s conclusion in section 6D below.

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

For the following reasons, the Complainant has failed to satisfy the Panel that the Respondent was likely to have been aware of the Complainant on acquisition of the disputed domain name in 2013.

First, the Complaint provides virtually no information about the nature or extent of the Complainant’s business. The Complainant’s Annex 7 is said to evidence “worldwide use” of the Complainant’s trade mark, but this exhibit in fact consists of a hotchpotch of unexplained documents, most of which are undated and many of which are untranslated. For example, there are photos of stands at exhibitions, but with no indication of where or when they were taken and what they are supposed to demonstrate. To the Panel, this exhibit is largely incomprehensible; certainly, it falls well short of establishing an extensive worldwide reputation, even in its specialised industry, at the time the disputed domain name was registered in 2013, or indeed at any other time.

Second, the archive website screenshots produced by the Respondent indicate that, until 2014, the Complainant’s primary brand was “Fermofeed”, rather than “Fertiplus”.

Third, the Respondent has established that there are many other businesses and organisations worldwide using the name “Fertiplus”, including a major company in the Netherlands, where the Respondent itself is located.

Fourth, the Panel has been given no reason to doubt the Respondent’s assertion that it registered the disputed domain name in connection with its branding and website development business, as an ordinary combination of a short form for “fertility” and the word “plus” denoting something extra or special, or particularly good. The Panel notes that the Respondent owns other domain names consisting of the prefix “fert” and the suffix “plus”.

Fifth, there is no evidence that the disputed domain name has ever been used in a way which is remotely relevant to the Complainant's specialist business.

Sixth, the Panel does not consider the Respondent's offer to sell the disputed domain name is of any relevance, not only was this not an unsolicited offer by the Respondent, so far as the Panel can tell it was made to an enquirer which did not disclose its connection with the Complainant. Accordingly, the offer, irrespective of its size, does not remotely amount to evidence that the Respondent acquired the disputed domain name specifically for sale to the Complainant.

For the above reasons, the Complainant has not satisfied the Panel that the Respondent registered and/or used the disputed domain name in bad faith and the Panel finds that the Complainant has failed to establish the third element of paragraph 4(a) of the Policy.

### **E. Reverse Domain Name Hijacking ("RDNH")**

Paragraph 15(e) of the Rules provides that, if "after considering the submissions the panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding". RDNH is defined under the Rules as "using the UDRP in bad faith to attempt to deprive a registered domain-name holder of a domain name".

Section 4.16 of the WIPO Overview 3.0 sets out examples of the reasons articulated by panels for finding RDNH. These include: "... (ii) facts which demonstrate that the complainant clearly ought to have known it could not succeed under any fair interpretation of facts reasonably available prior to the filing of the complaint, including relevant facts on the website at the disputed domain name or readily available public sources such as the Whois database, ... (iv) the provision of false evidence, or otherwise attempting to mislead the panel, (v) the provision of intentionally incomplete material evidence – often clarified by the respondent, ... (vii) filing the complaint after an unsuccessful attempt to acquire the disputed domain name from the respondent without a plausible legal basis, (viii) basing a complaint on only the barest of allegations without any supporting evidence."

The Panel considers that the above circumstances apply here and, taken together, they warrant a finding of RDNH.

Most importantly, the Panel considers that the Complainant provided intentionally incomplete material evidence.

The Complaint claimed that the Respondent offered the disputed domain name to the Complainant for USD 17,500 (seemingly an error as the only price evidenced to the Panel is USD 19,750). The Complainant's Annex 8 consists of what appears to be part (no date / sender / recipient / subject information) of an email inviting the recipient to review a quote as well as the screenshot of a website page containing a quote for USD 19,750 quote (*i.e.*, not USD 17,500).

Following the email from the Respondent's attorney on June 4, 2018, warning that the Complainant's evidence was materially incomplete, the Complainant's filed a supplemental filing which produced a further different email, dated July 29, 2017, again inviting the recipient to view a quote (not supplied) for the disputed domain name, although this one was addressed specifically to the Complainant.

Accordingly, even after being warned by the Respondent, the Complainant has presented only a very fragmented version of the relevant sale communications between the Parties. Indeed, the Panel is still not sure that it has the full picture as the email of July 29, 2017, belatedly produced by the Complainant, implies that there was a separate interaction between the Parties in July, some months before the September / October communications mentioned in section 4 above.

In any case, it is clear to the Panel that the Complainant withheld evidence / information which would have clarified that, contrary to the impression given in the Complaint, the Respondent did not make any unsolicited offer to sell the disputed domain name to the Complainant. This was obviously a potentially material fact in the context of whether or not the Respondent registered the disputed domain name specifically for sale to the Complainant.

In addition, the Complaint was skeletal. As mentioned above, little if any meaningful information was provided about the nature and extent of the Complainant's business. The Complainant, when alleging bad faith, must have been aware that others, including in its own country, were using the name "Fertiplus" and that it would have needed far more substantiation to establish that the Respondent registered the disputed domain name with the Complainant in mind than might have been required had it been the only one using the name.

For the above reasons, the Panel considers that the Complaint was brought in bad faith in accordance with Paragraph 15(e) of the Rules.

## **7. Decision**

For the foregoing reasons, the Complaint is denied.

**Adam Taylor**  
Presiding Panelist

**Willem J. H. Leppink**  
Panelist

**The Hon Neil Brown Q.C.**  
Panelist  
Date: July 30, 2018