



## NATIONAL ARBITRATION FORUM

### DECISION

E.T. Browne Drug Co., Inc. v. palmers.com c/o TULCA LLC  
Claim Number: FA0903001253069

#### PARTIES

Complainant is **E.T. Browne Drug Co., Inc.** (“Complainant”), represented by **Pallavi Mehta Wahi**, of **K&L Gates LLP**, Washington, USA. Respondent is **palmers.com c/o TULCA LLC** (“Respondent”), represented by **Ari Goldberger**, of **ESQwire.com P.C.**, New Jersey, USA.

#### REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**palmers.com**>, registered with **Tucows Inc.**

#### PANEL

The undersigned certifies that he or she has acted independently and impartially and to the best of his or her knowledge has no known conflict in serving as Panelist in this proceeding.

Mr. Peter L. Michaelson, Esq. as Panelist.

#### PROCEDURAL HISTORY

The Complaint was brought pursuant to the Uniform Domain Name Dispute Resolution Policy (“Policy”), available at <[icann.org/services/udrp/udrppolicy24oct99.htm](http://icann.org/services/udrp/udrppolicy24oct99.htm)>, which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999, and approved on October 24, 1999, and in accordance with the ICANN Rules for Uniform Domain Name Dispute Resolution Policy (“Rules”) as approved on October 24, 1999, as supplemented by the National Arbitration Forum Supplemental Rules for Uniform Domain Name Dispute Resolution Policy then in effect (“Supplemental Rules”).

Complainant submitted a Complaint to the National Arbitration Forum (“Forum”) electronically on March 18, 2009; the Forum received a hard copy of the Complaint on March 19, 2009.

On March 19, 2009, Tucows Inc. confirmed by e-mail to the Forum that the <**palmers.com**> domain name is registered with Tucows Inc. and that Respondent is the current registrant of the name. Tucows Inc. has verified that Respondent is bound by the Tucows Inc. registration agreement and has thereby agreed to resolve domain-name disputes brought by third parties in accordance with the Policy.

On March 23, 2009, a Notification of Complaint and Commencement of Administrative Proceeding (the “Commencement Notification”), setting a deadline of April 13, 2009 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@palmers.com by e-mail.

On April 7, 2009, the FORUM granted Respondent's April 6, 2009 Request for Extension of Time to Respond to Complaint with Complainant's Consent, thereby setting a deadline of April 27, 2009 by which Respondent could file a Response to the Complaint.

A timely Response was received by the FORUM and determined to be complete on April 27, 2009.

On May 1, 2009, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the FORUM appointed Mr. Peter L. Michaelson, Esq. as Panelist and set a due date of May 15, 2009 to receive the decision from the Panel. Owing to unexpected time conflicts experienced by the Panel all of which constituted unforeseen circumstances, the FORUM, at the request of the Panel, extended this due date to May 29, 2009.

Subsequently, Complainant timely filed its Additional Submission on May 4, 2009 with the FORUM, followed shortly thereafter by Respondent having timely filed its Additional Submission with the FORUM on May 6, 2009. Both of those submissions have been considered.

#### **RELIEF SOUGHT**

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

#### **PARTIES' CONTENTIONS**

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

##### **1. Confusing similarity/identical**

Complainant contends that the disputed domain name is identical to its PALMER'S mark as it entirely consists of that mark.

Hence, Complainant concludes that it has met the requirements of paragraph 4(a)(i) of the Policy.

## 2. Rights and legitimate interests

Complainant contends, for any of various reasons, that Respondent has no rights or legitimate interests in the disputed domain name under paragraph 4(a)(ii) of the Policy.

First, Respondent is not affiliated with nor has it been granted any license or permission from Complainant to use the mark PALMER'S or register any domain name which includes the mark.

Second, as of the filing date of the Complaint, Respondent has not made a legitimate use of nor has it made demonstrable preparations to legitimately use, the disputed domain name in connection with a *bona fide* offering of goods and services. Complainant, on the other hand, has offered its services in connection with its mark PALMER'S since at least as early as 1886, thus ostensibly precluding Respondent from acquiring any trademark rights in that mark or using that mark for similar goods without infringing on Complainant's exclusive rights. Respondent is using the disputed domain name to redirect Internet users to Respondent's site which provides both third-party links, that generate click-through revenue to Respondent, and a search engine interface. Hence, Respondent is misleadingly diverting Internet users, intent on reaching Complainant's website, to Respondent's site instead for Respondent's pecuniary benefit, thus not using the name in connection with either a *bona fide* offering of goods or services (a copy of the home page of Respondent's website appears in Exhibit H to the Complaint) or a non-commercial or fair use.

Lastly, Respondent is not known by the mark PALMER'S as the WhoIs registration record for the disputed domain name (a copy of which appears in Exhibit G to the Complaint) lists "TULCA LLC" as the registrant, "Administrator, Tulca" as the administrative contact, and "Administrator, Tulca" as the technical contact.

## 3. Bad faith use and registration

Complainant contends that Respondent has registered and is using the disputed domain name in bad faith, hence in violation of paragraph 4(a)(iii) of the Policy.

First, Respondent selected, registered and is using the name -- which identically matches Complainant's mark PALMER'S -- to parasitically exploit and commercially benefit from the goodwill inherent in that mark. Specifically, that use strongly suggests that Respondent intentionally set out to attempt and is attempting to attract Internet users to its own website, for commercial gain, by creating a likelihood of confusion with Complainant's mark. In that regard, Internet users seeking information on Complainant's PALMER'S-branded products may become confused, upon being directed to Respondent's site, that a relationship or affiliation exists between Complainant and Respondent or that Complainant endorses or sponsors Respondent's activities -- when, in actuality, no such relationship, affiliation, endorsement or sponsorship exists.

Second, Respondent had actual knowledge, if not just constructive, of Complainant's marks and its exclusive rights in those marks when Respondent registered and subsequently used the disputed domain name.

## B. Respondent

### 1. Confusing similarity/identical

Respondent does not contest Complainant's allegation that the domain name is identical to Complainant's mark PALMER'S or that Complainant has valid, exclusive rights in that mark.

### 2. Rights and legitimate interests

Contrary to Complainant's contentions, Respondent claims that, for any of several reasons, it has rights and legitimate interests in the disputed domain name.

First, Respondent alleges that the formative portion of the domain name, i.e., the second level domain, specifically "palmers," is a common word or common surname in the English language which, in and of itself, evidences Respondent's legitimate interest in the name as registration of domain names that solely consist of such terms is lawful under the UDRP. Specifically, "palmers" is the plural version of "palmer," the latter being a word that describes "someone who palms a card or other object." "Palmer" also has an historic meaning as describing a pilgrim. See a hard-copy printout of a definition for the term "palmer" provided from <http://dictionary.reference.com> and which appears in Exhibit 3 to the Response.

Further, when Respondent acquired the name in 2004 from its prior owner, Palmers Photography, Respondent did not acquire the name with any knowledge of Complainant's mark PALMER'S and merely believed, at the time, that the name was a common word in the English language.

Second, Respondent did not register the name with any intent to profit from use of Complainant's mark.

Third, Respondent uses the name in conjunction with a legitimate *bona fide* purpose, namely its SearchMachine.com advertising network. Respondent has been operating this network since 2001. The network consists of a network of inter-related websites hosted at domain names, owned by Respondent, which display links to various categories of products and services. Each of the links, when clicked by an Internet user, returns sponsored advertising links provided by a feed from Google. Google shares resulting click-through advertising revenue with Respondent. Respondent also receives revenue directly from individual advertisers on its sites. None of the links that appeared on Respondent's website, to which the disputed name resolves, has ever been related to goods and services associated with Complainant's mark PALMER'S. Respondent sells its advertising directly to advertisers and also, through its website, provides news content

and free e-mail service -- all of which further supports Respondent's legitimate *bona fide* use of the name.

Lastly, Complainant, through offering to purchase the disputed domain name for a "substantial sum," let alone on two separate occasions (one in 2004, the other in 2008), has implicitly recognized Respondent's legitimate interest in that name.

### 3. Bad faith use and registration

Respondent contends, also contrary to Complainant's position, that it neither registered nor used the disputed domain name in bad faith.

First, Respondent had no knowledge of Complainant or its mark when Respondent acquired the name in 2004. In that regard, Respondent acquired the name as part of a settlement with its former advertising client, Palmers Photography, and accepted the name believing that "palmers" was a common term in the English language. Moreover, that word is now subject to considerable third-party use, thus precluding Complainant from asserting any exclusive rights to it.

Second, since nearly four years elapsed from the time in 2004, when Complainant first contacted Respondent concerning the name, to 2008 when Complainant again contacted Respondent about the name, the passage of that length of time inferentially suggests that Complainant did not believe Respondent was violating Complainant's rights in its mark PALMER'S or was exercising bad faith. Furthermore, in both instances when Complainant contacted Respondent, Complainant never asserted any legal claim to the name.

Third, Respondent has never offered to sell the disputed domain name, and in fact has rejected Complainant's repeated offers to purchase it.

Lastly, Respondent never used the name to list advertisements on its site for goods and services that competed with were similar to those of Complainant and with which its uses the mark PALMER'S.

### C. Additional Submissions

As indicated above, both Complainant and Respondent timely filed additional submissions -- all of which the Panel has fully considered.

The Panel finds that, for the most part, these submissions amplify and provide further detailed support for the allegations that have already been raised by the parties in their initial round of pleadings. Consequently, for the sake of brevity and economy of effort, the Panel sees no particular need to summarize either of the additional submissions here.

## **FINDINGS**

As indicated in the WhoIs registration records provided in Exhibit G to the Complaint,

the disputed domain name was originally registered on December 20, 1995.

A. Complainant's PALMER'S Marks

Complainant owns a number of United States trademark registrations for the mark PALMER'S either in block letters or stylized form. Complainant has provided, in Exhibit F to the Complaint, copies of its United States registration certificates for various ones of those marks. All these registrations have become incontestable. Pertinent details of these registrations are as follows:

1. PALMER'S (stylized)  
United States registration 305,091; registered: August 1, 1933

This mark is registered for use in connection with "medicinal and toilet soap" in international class 3. The registrant claims that both its first use and first use in commerce of this mark, when used in conjunction with these goods, commenced as of December 1, 1886.

2. PALMER'S (stylized)  
United States registration 1,005,155; registered: February 25, 1975

This mark is registered for use in connection with "shampoo; hair conditioner and hair pomade" in international class 3. The registrant claims that both its first use and first use in commerce of this mark, when used in conjunction with these goods, commenced as of April 24, 1973.

3. PALMER'S (with design)  
United States registration 2,869,295; registered: August 3, 2004

This mark is registered for use in connection with "skin care products for the face, lips and body, namely, skin moisturizing and softening lotion and cream, fade cream, skin whitening cream, depilatories, after shave, shave cream, lip balm and stick moisturizers for lips and skin, medicinal and toilet soaps, liquid soaps, body wash, body oil, skin toners, massage cream, moisturizing breast cream for nursing mothers, hand creams, suntan oil and cream, non-medicated skin ointments, skin nourishing preparations; and hair care products, namely, shampoo, conditioners, pomades, hair styling and setting mousse, gels and sprays, hair spray, hair sheen spray and gel, hair moisturizers, hair shaping wax, hair relaxer cream and kits, home permanent kits, hair treatment for dry and breaking hair, hair balm, and hair nourishing preparations" all in international class 3; and "mediated skin ointment, astringent cleanser, and antiseptic cleansing lotion; ointment, salve or pomade used in and for the mitigation and treatment of skin affections, disease, disorders, and eruptions; medicated diaper rash cream and ointment" all in international class 5. The registrant claims that both its first use and first use in commerce of this mark, when used in conjunction with the goods in both classes, commenced no later than December 31, 2000.

## B. Complainant and its activities

Complainant produces skin and hair care products and sells its product both domestically and worldwide. Complainant has used its mark PALMER'S since at least 1886 (some 123 years ago) in connection with its entire line of those products. See declaration of Ms. Amy Feldman, a copy of which appears in Exhibit C to the Complaint.

The mark PALMER'S is a house mark associated with Complainant's brands of cocoa butter products, including PALMER'S Cocoa Butter Formula. The same mark is also used on PALMER'S Skin Success, PALMER'S Shea Butter Formula, PALMER'S Olive Butter Formula, PALMER'S Olive Oil Formula, PALMER'S Hair Success, PALMER'S Coconut Oil Formula, PALMER'S No Blade, PALMER'S Hair Care Line, PALMER'S Skin Softening Line, and PALMER'S Organics. *Id.*

Complainant has extensively advertised and marketed its products under its mark PALMER'S and, over the years, has made substantial investments in doing so. *Id.*

The mark appears prominently in Complainant's advertising, including in Internet advertising, printed articles, radio, television, and other promotional materials (a copy of those materials appears in Exhibit D to the Complaint). Virtually all of Complainant's products prominently display the PALMER'S mark. See Feldman declaration.

## C. Respondent and its activities

Since 2001, Respondent has continuously operated an Internet advertising business known as SearchMachine.com, which consists of a network of inter-related websites hosted at corresponding domain names owned by Respondent. Each of these sites, including that to which the disputed name resolves (a hardcopy print-out of its home page appears in Exhibit H to the Complaint), displays links to various categories of third-party products and services which, when clicked, return a lower-level page of sponsored advertising links. The advertising links are provided by a feed from Google which shares click-through advertising revenue with Respondent. Respondent also receives revenue directly from individual advertisers. In addition, Respondent, through its websites, sells advertising directly to advertisers, and provides news content, free email service and a web search capability.

Respondent has registered numerous descriptive and common word domain names which it uses for websites in its SearchMachine.com business, including, among others, <clickthislink.com>, <craft.com>, <script.com>, <rug.com>, <any.com>, <moe.com>, <resellers.com>, <apartment.net>, <construct.com>, <fastcar.com>, <wealthy.com>, <watchout.com>, <symptoms.com>, <nosnore.com> and <marketingservices.com>.

Respondent acquired the disputed domain name in November 2004 by transfer from its prior registrant, Palmers Photography (a copy of an e-mail transfer report from the registrar at the time appears in Exhibit C to the Response). Respondent had provided advertising services to Palmers Photography which, in turn and as a result of a

wind-down of that business, transferred the name to Respondent to settle its advertising account with Respondent. See declaration of Mr. Jeff Greenberg, a copy of which appears in Exhibit 1 to the Response.

Respondent initially used the domain name in connection with photography-related advertisements because it believed the name had “built-in traffic for photography services,” and thereafter shifted its use to its SearchMachine.com business.

The word “palmer” and its possessive/plural forms, including “palmers” are all subject to third-party use. A Google search performed by Respondent and designed to avoid references to Complainant yielded over 1 million hits for “palmers.” There are over 50 active and pending trademark registrations which incorporate “palmer” or “palmers.” There are also over 3,600 companies listed on YellowPages.com with “Palmer” or “Palmers” in their company name.

#### D. Interactions between the parties

Complainant’s prior counsel inquired on two separate occasions about purchasing the disputed domain name from Respondent. The first inquiry was a call in December 2004 from Ms. Barbara J. Grahm, Esq with the Oppenheimer, Wolff & Donnelly law firm. Respondent advised Ms. Grahm that the name was not for sale and sent her a responding email message (a copy of which appears in Exhibit 8 to the Response) on December 20, 2004. At that time, Respondent was not aware that Ms. Grahm represented Complainant as apparently she did not disclose her client’s identity. See Greenberg declaration.

On June 12, 2008 -- some 3 1/2 years after that first contact, Ms. Grahm again contacted Respondent, though via email (a copy of which appears in Exhibit 9 to the Response) and through which she stated:

We have been trying to contact the registrant of the palmers.com domain name to discuss a possible purchase of the domain name. We have a client who is very interested in buying this domain name. Can you assist us? Our client is prepared to pay a substantial sum for the domain name.

After receiving that message, Respondent called Ms. Grahm and stated that the name was not for sale. At that time, Ms. Grahm disclosed that her client was Complainant. Mr. Greenberg did not negotiate to sell the name nor did he provide a price to Ms. Grahm at which Respondent would sell the name to Complainant. See Greenberg declaration.

## **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.”

Paragraph 4(a) of the Policy requires that Complainant must 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;
- (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 and/or Confusingly Similar**

The Panel finds, even apart from the fact that Respondent did not contest this issue, that the disputed domain name is confusingly similar if not, for all practical purposes, identical to Complainant's mark PALMER'S.

The only differences between the disputed domain name and the mark are the elimination of an apostrophe from the mark PALMER'S and the appending the gTLD (generic top-level domain) ".com" to the resulting term PALMERS to form the name – with the last addition being irrelevant in assessing confusing similarity or identity under paragraph 4(a) of the Policy and thus ignored.

It is now very well-established in UDRP precedent, including numerous decisions previously rendered by this Panel, that a minor variation, such as adding or deleting a punctuation mark, a short letter or number groups or even generic or highly descriptive words to a mark, is usually insufficient in and of itself, when used in forming a domain name that results from modifying the mark, to confer requisite and sufficient distinctiveness to that name to avoid user confusion. Here, the Panel views deleting the apostrophe from the mark PALMER'S as clearly one such minor variation. *See, e.g., Starline Publ'n, Inc. v. Unity*, D2008-1823 (WIPO Feb. 2, 2009); *see also Hawaii Cmty. Fed. Credit Union v. Tex. Int'l Prop. Assoc. - NA NA*, FA 1210174 (Nat. Arb. Forum Sept. 3, 2008); *see also 322 W. 57th Owner LLC v. Domain Admin.*, D2008-0736 (WIPO Aug. 6, 2008); *see also Dreamworks Animation, LLC v. Creahq*, D2008-0505 (WIPO May 28, 2008); *see also Marvel Mfrg. Co. Inc. v. Koba Internet Sales, LP*, D2008-0265 (WIPO May 5, 2008); *see also BlackRock, Inc. v. blackrockfinancialservices.com*, D2007-1627 (WIPO Jan. 4, 2008); *see also F. Hoffmann-La Roche AG v. Transliner Consultants*, D2007-1359 (WIPO Nov. 14, 2007); *see also Nat'l Football League v. Blucher*, D2007-1064 (WIPO Sept. 24, 2007); *see also Toilets.com, Inc. v. Rons Porta Johns*, D2007-0952 (WIPO Aug. 27, 2007); *see also Assoc. Bank Corp. v. Tex. Int'l Prop. Assoc.*, D2007-0334 (WIPO June 28, 2007); *see also Gerber Childrenswear Inc. v. Webb*, D2007-0317 (WIPO Apr. 24, 2007); *see also SPX Corp. v. Hevun Diversified Corp.*, FA 791657 (Nat. Arb. Forum Nov. 13, 2006); *see also Google Inc. v. Burns*, NAF Case No. FA 726096 (Nat. Arb. Forum Aug. 16, 2006); *see also Cheesecake Factory Inc. & Cheesecake Factory Assets Co., LLC v. Say Cheesecake*, D2005-0766 (WIPO Sept. 12, 2005); *see also Napster, Inc. v. Vinscani*, D2005-0531 (WIPO July 19, 2005); *see also Caesars Entm't Inc. v. Nova Internet Inc.*, D2005-0411 (WIPO June 22, 2005); *see also Lockheed Martin Corp. v. Skunkworx Custom Cycle*, D2004-0824 (WIPO Jan. 18, 2005); *see also Lockheed Martin Corp. v. Teramani*, D2004-0836 (WIPO Dec. 1, 2004); *see also Nat'l Collegiate Athletic Assoc. v. Brown*, D2004-0491 (WIPO Aug. 30, 2004); *see also Lane-Labs USA, Inc. v. Powell Prod.*, FA 155896 (Nat. Arb.

Forum July 1, 2003); *see also Cable News Network LP, LLP v. Khouri*, FA 117876 (Nat. Arb. Forum Dec. 16, 2002).

Therefore, the Panel finds that the disputed domain name is confusingly similar, if not essentially identical, to Complainant's mark PALMER'S as to cause confusion; hence, Complainant has satisfied its burden under paragraph 4(a)(i) of the Policy.

### **Rights or Legitimate Interests**

Based on the evidence of record here, the Panel finds that no basis exists which, under the circumstances here, would legitimize Respondent's claim to the disputed domain name under paragraph 4(c) of the Policy.

Complainant has never authorized Respondent to utilize its mark PALMER'S, nor does Complainant apparently have any relationship or association whatsoever with Respondent. As such, any use to which Respondent were to put that mark in connection with the identical or similar goods to those currently provided by Complainant or even services related to those goods, would seem to violate the exclusive trademark rights now residing with Complainant. *See, e.g., Unique Brands Enter., LLC v. Media Insights, Media Insight*, D2008-1749 (WIPO Jan. 8, 2009); *see also MySpace, Inc. v. Edwin De Jesus, EDJ Associates Inc.*, D2007-1878 (WIPO Mar. 12, 2008); *see also GoDaddy.com, Inc., v. GoDaddysDomain.com, Clark Signs, Graham Clark*, D2007-0303 (WIPO May 7, 2007); *see also Citgo Petroleum Corp. v. Antinore*, D2006-1576 (WIPO Mar. 14, 2007); *see also New Destiny Internet Group, LLC & Xplor Media, Inc. v. SouthNetworks*, D2005-0884 (WIPO Oct. 14, 2005); *see also Pelmorex Communications Inc. v. weathernetwork*, D2004-0898 (WIPO Dec. 28, 2004); *see also Sybase, Inc. v. Analytical Sys.*, D2004-0360 (WIPO June 24, 2004); *see also Caesars World, Inc. & Park Place Entm't Corp. v. Japan Nippon*, D2003-0615 (WIPO Sept. 30, 2003); *see also Leiner Health Services Corp. v. ESJ Nutritional Prod.*, FA 173362 (Nat. Arb. Forum Sept. 16, 2003); *see also MPL Communications, Ltd. et al v. IWebAddress.com*, FA 97092 (Nat. Arb. Forum June 4, 2001); *see also Treeforms, Inc. v. Cayne Indus. Sales, Corp.*, FA 95856 (Nat. Arb. Forum Dec. 18, 2000); *see also Am. Online, Inc. v. Xianfeng*, D2000-1374 (WIPO Dec. 11, 2000). Consequently, Respondent could not legally acquire any public association between it and any of Complainant's marks, for any of the goods and services rendered by Complainant, or, broadly speaking, any good or service likely perceived by its users to be so similar and/or to emanate from or be related, in any fashion, to those then offered by Complainant.

Further, there is no evidence of record that Respondent has ever been commonly known by the disputed domain name or more generally the mark PALMER'S or even one similar thereto. In that regard, Respondent appears more likely to be known by TULCA LLC, which is indicated on the WhoIs record for the name. Nor could Respondent in this case likely ever become commonly known by either the disputed domain name or Complainant's mark, in light of Complainant's exclusive trademark rights, with first use of its mark dating back to December 1, 1886, which is nearly 109 years prior to the date, December 20, 1995 (according to the WhoIs record provided in Exhibit 1 to the

Complaint) on which the disputed domain name was initially registered (Respondent having acquired the name from that registrant by transfer during 2004) and the reputation and notoriety which Complainant has apparently gained in its mark during that time, without infringing on the exclusive trademark rights of Complainant. *See, e.g., Starline Publ'n, Inc. v. Unity*, D2008-1823 (WIPO Feb. 2, 2009); *see also HRB Innovations Inc., Express Tax Serv. Inc. v. Brown*, D2008-1072 (WIPO Sept. 4, 2008); *see also MySpace, supra*; *see also Treeforms, Inc., supra*.

Furthermore, given that Respondent's activities are clearly commercial in nature as Respondent receives pecuniary benefit in the form of, among other forms, shared click-through revenue, Respondent's use of the name is clearly neither a legitimate noncommercial nor a fair use as would be required under paragraph 4(c)(iii) of the Policy.

Lastly, this Panel finds that Respondent has not made nor is making demonstrable preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services prior to its having received notice of this dispute. In that regard and for reasons set forth below, the Panel finds that Respondent's use of the name in offering third-party links and corresponding third-party goods and services to Internet users evidences bad faith and hence is not *bona fide*. Consequently, Respondent's conduct does not fall within paragraph 4(c)(i) of the Policy either.

Accordingly, the Panel concludes that Respondent has no rights or legitimate interests in the disputed domain name within paragraph 4(a)(ii) and 4(c) of the Policy.

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

The Panel finds that Respondent's actions, with respect to the disputed domain name, constitute bad faith registration and use.

First, the Panel is not persuaded by Respondent's repeated argument that the term "palmer" is now a common word in contemporary English. In that regard, Respondent's sorely strains all credibility by contending that "palmer" is somehow *sui generis*, in terms of being descriptive and/or a commonly used word or surname with other terms or phrases which clearly are, such as "click this link," "craft," "script," "rug," "any," "moe," "resellers," "apartment," "construct," "fast car," "wealthy," "watch out," "symptoms," "no snore," and "marketing services" -- all of the latter being terms which Respondent admits it registered as domain names given its business plan of registering terms that are descriptive, common and/or a surname. To equate the term "palmer" as being equivalent to any of the latter terms in terms of the extent of its use and the widely known and immediately recognized nature of its meaning -- which are characteristics of a descriptive or common name or surname -- is senseless. The Panel rejects what to it appears to be Respondent's implicit view that merely because a word is listed in a dictionary, that alone *a priori* signifies that the term is a descriptive or common word or surname. It is not. Respondent, other than attempting to put forth such a connection, offers no convincing, independent proof, whether by credible survey evidence, expert assessment or otherwise,

to support its view that the term “palmer” has attained the level of public recognition which Respondent claims the term has. Dictionaries contain a myriad number of words that are obscure, abstruse, esoteric and/or just rarely used in contemporary speech or even known to more than a very small percentage of a relevant population, here being the Internet user community at large. “Palmer” is one such word, with whatever commonplace meaning it once may have had, other than that of a widely-used trademark dating back to the 1880’s -- nearly 120 years ago, it has likely long since lost to the vicissitudes of modern English vernacular some time ago.

Second, the Panel finds that, in spite of Respondent’s statement to the contrary, it uses the disputed domain name to divert Internet users, intent on reaching Complainant’s website, to its own site instead through those users may well be exposed to third-party offerings competitive with those of Complainant, to the benefit of Respondent and detriment to Complainant.

Specifically, whenever an Internet user clicks on a subject matter category or sub-category on Respondent’s home page that, in turn, results in a lower-level page of third-party links then being fetched and displayed on that user’s browser. The user can then click on any such link on that lower-level page to be taken to the third-party website associated with that link. Moreover, a user can enter a term, as the Panel did here, into a search box displayed on the home page of Respondent’s website, conduct a web search there through, and obtain a listing of search responses (“hits”) relevant to the search term(s), with each of those hits containing a third-party link and a few words of accompanying descriptive text. The user can click on any of these links and similarly be taken to the third-party website associated with that link.

Respondent apparently has no control over which links are supplied for each category or sub-category listed on the home page of Respondent’s site. Respondent, by its own admission, has ceded that task to a third-party entity, here being Google, to select the specific links and provide those links to Respondent’s web server in the course of that server returning a lower-level page of links to each requesting Internet user. The Panel infers, due to no evidence to the contrary, that Respondent also relies on Google to implement Respondent’s search function provided through its home page and return a list of hits to Respondent’s web server which, in turn, populates a lower-level web page with those hits and then ultimately returns that lower-level page to a requesting Internet user for display on his(her) browser.

Respondent would like this Panel to believe that no such user has yet been exposed to any goods or services, through any of the links accessible through that site, associated with Complainant’s mark PALMER’S and thus implicitly invites this Panel to extend that view to all such future users. The Panel’s own experience with Respondent’s website strongly dictates otherwise.

Given the Panel’s view that the term “palmer” is rather obscure, those Internet users who recognize the term probably do so only in its trademark sense, i.e., the context of its secondary meaning, as connoting to those users some relationship, affiliation, or

endorsement with Complainant's products that bear the mark PALMER'S. Hence, it stands to reason that such an Internet user who enters the name <palmers.com> into his(her) browser does so to seek information concerning Complainant's PALMER'S-branded goods and, as such, would expect to reach Complainant's website. Instead, that user would reach Respondent's website. Accepting Respondent's apparent position that there are no category or sub-category (each of which is a link in itself) listed on its home page that has ever been related to goods and services associated with Complainant's mark PALMER'S, then, should that user persist in his(her) attempt to locate information about Complainant's PALMER'S-branded products, that user may very likely, as this Panel did, enter the term "palmers" into the search box provided on Respondent's home page to initiate a web search to locate Complainant's website. What resulted -- and of which this Panel has taken judicial notice? A lower-level page containing links, obviously provided by Google, not only to third-parties which offered Complainant's products, but also to third-parties which offered skin-care products competitive with those of Complainant.

Respondent is fully responsible for all content, including links, that appears on its website -- regardless of how or from where that content originates. Consequently, Respondent is liable for any links which a third-party, here being Google, provides to Respondent and which then appear on any page displayed as part of Respondent's website.

Since Respondent apparently exerts no control over which search terms Internet users can enter into the search box and then search through Respondent's search functionality, as the Panel did here with the term "palmers," and which hits Google returns in response, namely to providers of Complainant's goods and of competitive goods, the potential for competitive harm to Complainant certainly exists. Given the automated nature of Respondent's site, Respondent would probably be oblivious to each specific instance -- as it probably is here -- that actually occurred, yet Respondent would receive pecuniary benefit from each instance through sharing click-through revenue with Google.

Thus, it is clear to this Panel that, although Respondent strenuously argues that, to its knowledge, it is not diverting Internet users, to websites offering products competitive with those Complainant provides under its mark, for its own pecuniary gain, in actuality, Respondent's website, for which Respondent is ultimately responsible, is doing just that. Such a result would or should have been readily foreseeable to Respondent at the time it acquired the name which (in 2004) was approximately 3 years (in 2001) after the time Respondent started its SearchMachine.com advertising network. While Respondent initially continued use of the name in the same manner which the predecessor owner (and presumably original registrant) did, i.e., in conjunction with a photography store named "Palmers Photography," obviously doing so, in all likelihood, was not the underlying reason why Respondent decided to accept transfer of the name from that registrant.

The Panel can think of no legitimate reason why Respondent would have chosen the rather obscure term "palmers" other than to subsequently use in conjunction with its advertising network to opportunistically cause and exploit user confusion and diversion to sites competitive with Complainant's product offerings and through which Respondent

would ultimately profit. Respondent's conduct, as experienced by the Panel here, accomplishes just that.

Hence, this Panel finds that Respondent's registration (by way of transfer) and its ultimate use of the disputed domain name constitute bad faith under paragraph 4(b)(iv) of the Policy.

Furthermore, though Respondent stated that, since the time it acquired the name in 2004, it refused several third-party offers to purchase the name, nevertheless the bottom of its website contains the following statement: "For specific domain name inquiries, please refer to the 'Public Whois' and contact the domain name owner(s) and/or administrator(s) direct." While this language does not expressly constitute an offer to sell the name, the implication is quite clear: Respondent will entertain offers to purchase the name for a sufficiently high price. Why would Respondent place such a statement at the end of its home page, as nearly any Internet user is already familiar with domain name information provided through WhoIs sites? The Panel, when assessing the import of this language particularly through the prism and context of the entirety of Respondent's conduct here, can think of no plausible reason other than inducing an Internet user who is interested in purchasing the name to contact Respondent, as the listed owner and administrator, and submit a sufficiently high offer. In the Panel's view, this particular conduct reflects bad faith under paragraph 4(b)(1) of the Policy.

Hence, the Panel concludes that Respondent violated paragraph 4(b) and hence 4(a)(3) of the Policy.

Thus, the Panel concludes that Complainant has provided sufficient proof of its allegations, with respect to the disputed domain name, to establish a case under paragraph 4(a) of the Policy upon which the relief it now seeks can be granted.

### **Reverse Domain Name Hijacking**

Since the Panel has found for Complainant, Respondent's invitation to the Panel, to assess whether Complainant's action in filing Complainant amounted to reverse domain name hijacking, is now moot.

## **DECISION**

In accordance with Paragraph 4(i) of the Policy and Paragraph 15 of the Rules, the relief sought by Complainant is hereby **GRANTED**.

Accordingly, the Panel orders that the disputed domain name, <**palmers.com**>, is to be **TRANSFERRED** from Respondent to Complainant.

Peter L. Michaelson, Esq., Panelist  
Dated: May 29, 2009