

Before the:

**WORLD INTELLECTUAL PROPERTY ORGANIZATION
ARBITRATION AND MEDIATION CENTER**

"NIX SOLUTIONS LTD" LIMITED
LIMITED LIABILITY COMPANY
181 GAGAINA AVE, OFFICE 401
KHARKIV, UKRAINE, 61105

(Complainant)

-v-

Redacted

(Respondent)

Case No: D2014-1475

Disputed Domain Name[s]:

NIXSOLUTIONSSUCKS.COM
NIXSOLUTIONS-SUCKS.COM

RESPONSE

(Rules, para. 5(b))

I. Introduction

[1.] On September 16, 2014, the Respondent received a Notification of Complaint and Commencement of Administrative Proceeding from the WIPO Arbitration and Mediation Center (the **Center**) by e-mail informing the Respondent that an administrative proceeding had been commenced by the Complainant in accordance with the Uniform Domain Name Dispute Resolution Policy (the **Policy**), approved by the Internet Corporation for Assigned Names and Numbers (**ICANN**) on October 24, 1999, the Rules for Uniform Domain Name Dispute Resolution Policy (the **Rules**), approved by ICANN on October 30, 2009, and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the **Supplemental Rules**). The Center set October 6, 2014 as the last day for the submission of a Response by the Respondent.

II. Respondent's Contact Details
(Rules, para. 5(b)(ii) and (iii))

[2.] The Respondent's contact details are:

Name: Redacted
Address: Redacted
Telephone: Redacted
Fax: N/A
E-mail: Redacted

[3.] The Respondent's authorized representative in this administrative proceeding is:

N/A

[4.] The Respondent's preferred method of communications directed to the Respondent in this administrative proceeding is:

Electronic-only material

Method: e-mail
Address: Redacted
Contact: Redacted

Material including hardcopy (where applicable)

Method: post/courier
Address: Redacted
Fax: N/A
Contact: Redacted

III. Response to Statements and Allegations Made in Complaint
(Policy, paras. 4(a), (b), (c); Rules, para. 5)

[5.] The Respondent hereby responds to the statements and allegations in the Complaint and respectfully requests the Administrative Panel to deny the remedies requested by the Complainant.

A. Whether the domain name[s] [is/are] identical or confusingly similar to a trademark or service mark in which the Complainant has rights;

(Policy, para. 4(a)(i))

- Complainant's mark "NIX" is not registered in North America and is not recognized nor protected under the laws of the United States of America. Complainant's rights in the mark "NIX" does not extend beyond Ukraine where the mark has been registered and protected under Ukraine law. Trademarks are territorial and must be filed in each country where protection is sought. Other commercial entities have registered the mark "NIX" in the United States of America, and other international commercial entities use the mark "NIX" in domain names, such as the internet technology commercial website located at www.nix-solutions.com (see Annex 1 thru 3). Additionally, "nixsolutions" is not a mark recognized nor protected in either Ukraine or North America.
- Notwithstanding the Complainant's absence of a registered trademark in North America, "*the noncommercial use of a trademark as the domain name of a website - the subject of which is consumer commentary about the products and services represented by the mark - does not constitute infringement under the Lanham Act.*" (see *Bosley Medical Institute, Inc. v. Kremer*).
- Respondent's registration and use of the disputed domain names does not violate the Complainant's rights to the Trademark. Respondent is free to use the websites associated with the disputed domain names to make reference to Nixsolutions Ltd. in commentary about that company and its business practices (see *McLane Co. v. Craig*, WIPO Case No. D2000-1455 (2001) ("*Protest and commentary is the quintessential noncommercial fair use envisioned by the [Uniform Domain Name Dispute Resolution] Policy.*") Respondent's critique of Complainant's business practices does not constitute infringement in the USA and is protected speech under the First

Amendment. (see, e.g., *Global Telemedia International, Inc. v. Doe*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001)); *Computer Xpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1011 (2001).

- Respondent is engaging in consumer criticism, and no reasonably prudent user of the Internet, including Ukrainian nationals seeking employment from the Complainant, would believe that the disputed domain names belong to or are sponsored by the Complainant. (See *Bally*, 29 F. Supp. 2d at 1165 n.2;) see also, e.g., *Lucent Technologies, Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528 (E.D. Va. 2000). See also, e.g., *Asda Group Limited v. Mr Paul Kilgour* WIPO Case No. D2002-0857 (2002) ("*The Panel believes that by now the number of Internet users who do not appreciate the significance of the '-sucks' suffix must be so small as to be de minimis and not worthy of consideration . . . The Panel believes that Internet users will be well aware that a domain name with a '-sucks' suffix does not have the approval of the relevant trade mark owner.*"). Complainant's company specializes in outsourced IT commerce, in which English is the foremost language of communication.
- Although the Respondent is free to display the Complainant's logo (see *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1163-64 (C.D. Cal. 1998), ("*An individual who wishes to engage in consumer commentary must have the full range of marks that the trademark owner has to identify the trademark owner as the object of the criticism.*"), the websites associated with the disputed domain names do not display any images related to the Complainant's mark "NIX" such as logos, signs, banners, watermarks, nor do they promote or offer any services related to software development, technical support, IT consulting, or any other services provided by the Complainant. The websites associated with the disputed domain names also do not provide references or links to any of the Complainant's competitors.

B. Whether the Respondent has rights or legitimate interests in respect of the domain name/s/;

(Policy, para. 4(a)(ii))

- Respondent's use of the disputed domain names is for consumer criticism and the disparaging statements made by the Respondent is protected speech under the laws of the USA. Complainant has no claims of defamation against the Respondent's statements unless the statements complained of are false. (see *Cal. Civ. Code § 45*). As a public figure, the Complainant also has no claim for false statements unless the Complainant can establish, by clear and convincing evidence, that the statements were made with knowledge that they were false or with substantial subjective awareness that the statements were probably false. Also, the Complainant must establish that any statements complained of by the Complainant are factual, and are not statements of opinion protected by First Amendment.
- Respondent's complaint against Complainant (provided in Annex 4) establishes the Respondent's legitimate and fair use of the disputed domain names. Respondent's complaint is a 50 page document (containing footnotes and corresponding evidence) detailing the Respondent's business transactions with the Complainant. A direct link to the Respondent's complaint is clearly provided on the websites associated with the disputed domain names. The Respondent's complaint is a factual and accurate document containing evidence in support of the Respondent's criticisms of the Complainant, its employees, and representatives. As a former client of the Complainant, the Respondent's complaints against Complainant is the basis for legitimate non-commercial and fair use of the disputed domain names in communicating the Respondent's consumer criticisms of the Complainant's business practices.
- The websites associated with the disputed domain names do not contain any confidential or private information about the Complainant, its employees, or representatives. The information displayed on the websites associated with the disputed domain names is that which is already widely available to the general public. The information can be gleaned from free publicly accessible websites and services (such as LinkedIn, Google, Facebook, ICQ, and Twitter) and has been posted on the internet publicly and voluntarily by the Complainant, its employees, and representatives.

C. **Whether the domain name[s] [has/have] been registered and [is/are] being used in bad faith.**

(Policy, para. 4(a)(iii))

- Respondent severed business ties with the Complainant in the year 2013. Following the Respondent's inability to obtain recourse from the Complainant (due to geographical complications such as the lack of treaties between the Respondent's and Complainant's host nations which make favorable legal judgments unenforceable) and financial restraints (the substantial cost of pursuing a lawsuit against the Complainant), the Respondent registered the disputed domain names to inform consumers about the Complainant's business practices.
- Respondent had the opportunity to purchase the domain name www.nixsolution.com which is confusingly similar to the Complainant's domain name (note the singular "Solution" on the domain name versus the plural "Solutions" on the Complainant's domain name), but the Respondent declined. On December 28, 2013, the Respondent received an email from an individual named Yuriy Zaytev who offered to sell the domain name www.nixsolution.com to the Respondent for a nominal sum (see Annex 5). Respondent respectfully ignored the offer, having no interest in acquiring a domain name that is confusingly similar to the Complainant's domain name. (see, e.g., *Hollenbeck Youth Center, Inc. v. Stephen Rowland*, WIPO Case No. D2004-0032 “ . . . it is the Panel’s belief that protest disseminated through the powerful tools of the Internet is only legitimate if the protest is transparent. Transparency starts with choosing a domain name which reflects the protest as opposed to a domain name which implies an affiliation to the trademark holder.”)
- Respondent's disputed domain names were not registered or acquired for the purpose of selling, renting, or otherwise transferring the domain name registrations to the Complainant. Respondent has never solicited the Complainant or any individual or company to sell the disputed domain names. See, e.g., *Caixa d’Estavis y Pensions de Barcelona v. Namezero.com*, WIPO Case No. D2001-0360 (2001) (distinguishing

criticism sites from those “*where the main aim of Respondents was selling their domain names for money*”).

- Respondent has no history of registering domain names in order to prevent the Complainant from reflecting the mark, nor is the Respondent a competitor of the Complainant.
- Respondent's true identity was submitted to the domain registrar, *Namecheap Inc.* (respectfully), upon registration of the disputed domain names where it remains presently, despite the Respondent being a potentially vulnerable private individual who might be the victim of persecution if the Respondent's true identity were known. Respondent has received at least one email from the Complainant in which the Complainant has threatened the Respondent with legal action (provided in Annex 6).
- Respondent's disputed domain names are not intended for commercial gain and have no revenue streams. The disputed domain names are unquestionably non-commercial, offering no products or services for sale, and bear none of the Complainant's intellectual property. The disputed domain names and the websites associated with them cannot by any stretch of the imagination be confused as being sourced, sponsored, affiliated, or endorsed by the Complainant.
- Respondent's statements about the Complainant, its employees, and representatives are factual, accurate, and based on four years of business dealings with the Complainant. Complainant operates a company that employs over 500 people according to the Complainant's online profile (provided in Annex 7). Respondent's statements are clearly directed only at employees that the Respondent personally dealt with as a client of the Complainant's company, and the individuals who are ultimately in charge of those employees' actions at the Complainant's company. All statements made by the Respondent is constitutionally protected free speech. (see also, e.g. *Asda Group Limited v. Mr Paul Kilgour* WIPO Case No. D2002-0857 (2002) (“*The Respondent’s behaviour in relation to the domain name has been grotesque. . . however, in the Panel’s view, the [matter] in question is outside the scope of the Policy when used in relation to a domain name*”).

which is not identical or confusingly similar to the Complainant's trade mark . . . The Policy is narrow in scope and is not intended to cover all [matters].").

- Respondent's statement that the Complainant has been involved in developing a hardcore explicit pornographic website is factual and irrefutable evidence verifying the statement is the hardcore explicit pornographic website that the Complainant developed for the Respondent from 2009 to 2013. The validity of Respondent's statements is supported by documented evidence assembled by the Respondent (provided in Annex 4)
- Respondent has re-posted publicly available information about the Complainant, its employees, and representatives that has been publicly and voluntarily posted on the Internet by the Complainant, its employees, and representatives (on sites and services such as LinkedIn, ICQ, Facebook). Respondent's invitation for viewers to submit reliable and verifiable public information on third persons without those persons' permission is conduct protected by the *Communications Decency Act*, 47 U.S. 230 (1996); See also, e.g., *Zeran v. America Online, Inc.*, 129 F. 3d 327, 330-31 (4th Cir. 1997), cert. Denied, 524 U.S. 937 (1998); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40 (Wash. Ct. App. 2001); *Right of Publicity* (See *Cal. Civ. Code* § 3344(a)); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

V. Administrative Panel

(Rules, paras. 5(b)(iv) and (b)(v) and para. 6; Supplemental Rules, para. 7)

- [6.] The Respondent elects to have the dispute decided by a single-member Administrative Panel.

VI. Other Legal Proceedings

(Rules, para. 5(b)(vi))

- [7.] There are no other legal proceedings that have been commenced or terminated in connection with or relating to the domain names that /are the subject of the Complaint.

VII. Communications

(Rules, paras. 2(b), 5(b)(vii); Supplemental Rules, para. 3, 7, 12)

[8.] A copy of this Response has been sent or transmitted to the Complainant on [date] by:

1) e-mail to the following email addresses of the Complainant:

- dmytro.gadomsky@juscutum.com
- Mikhail.Pergamenshik@juscutum.com

2) e-mail to following "postmater" email addresses:

- postmaster@nixsolutionsucks.com
- postmaster@nixsolutions-sucks.com

3) e-mail to the concerned registrar and reseller to legal@enom.com and support@namecheap.com respectively.

[9.] This Response is submitted to the Center in electronic form, including any annexes, in the appropriate format.

VIII. Payment

(Rules, para. 5(c); Supplemental Rules, Annex D)

[10.] N/A

IX. Certification

(Rules, para. 5(b)(viii), Supplemental Rules, para. 14)

[11.] The Respondent agrees that, except in respect of deliberate wrongdoing, an Administrative Panel, the World Intellectual Property Organization and the Center shall not be liable for any act or omission in connection with the administrative proceeding.

[12.] The Respondent certifies that the information contained in this Response is to the best of the Respondent's knowledge complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under the Rules and under

applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.

Respectfully submitted,

Shaun Ferguson

Date: 27 September 2014

X. List of Annexes

1. Screenshot of the commercial IT company website located at www.nix-solutions.com. This indicates that domains containing "NIX" are not exclusive to the Complainant nor to commercial entities in the same industry as the Complainant.
2. List of other active websites with "NIX" in the domain name.
3. Examples of "NIX" marks registered in the United States. A mark that Complainant has not registered in the United States. . Unlike these entities, Complainant has not made any attempt to protect its mark in the US by registering the mark.
4. A URL link to an online copy of Respondent's 50 plus page written Complaint against Complainant and a URL link to supporting evidence (over 100 individual items) corresponding to the footnotes in Respondent's Complaint. The complaint, substantiated by vast evidence supports Respondent's legitimate reason for and use of the disputed domains.
5. Screenshot of email received by Respondent from Yuriy Zaytev attempting to sell a domain confusingly similar to Complainant's domain. The screenshot contains Mr. Zaytev's email address, phone number, and address.
6. Screenshot of an email Complainant sent to Respondent threatening Respondent with legal action.
7. Screenshot of Complainant's company profile on Elance.com (an escrow site for developers where Respondent obtained Complainant's services). Indicates the ominous size of Complainant's (over 500 employees) in comparison to the Respondent, who is a private vulnerable to potential retribution.