1. PARTIES AND CONTESTED DOMAIN NAME

There are two Complainants. The First Complainant is Alibaba Group Holdings Limited, which has its registered address at 1 Capital Place 4th Floor, P. O. Box 847, Georgetown, Grand Cayman, Cayman Islands. The Second Complainant is Alibaba Group Services Limited, with an address at 26th Floor, Tower One, Time Square, 1 Matheson Street, Causeway Bay, Hong Kong. Their authorized representative in these proceedings is Hogan Lovells, 1 Pacific Place, 88 Queensway, Hong Kong.

The Respondent is TRADEWHOLESOME, with an address at Rooms 1318-20 Hollywood Plaza, 610 Nathan Road, Mongkok, Hong Kong. Its legal status is unknown and it has not appointed any authorized representative.

The domain name in dispute is tmall.com.hk. The Registrar of the disputed domain name is Hong Kong Domain Name Registration Company Limited. The disputed domain
name was registered on the 2nd November 2010 and its expiry date is to be the 2nd November 2012.

2. PROCEDURAL HISTORY

The Complainants filed a Complaint in accordance with the HKIAC Supplemental Rules on the 15th February 2012 and elected to have the Complaint decided by one (1) Panelist. The Complaint is to be considered under the HKIRC Domain Name Dispute Resolution Policy ("the Dispute Resolution Policy"), HKIRC Domain Name Dispute Resolution Policy Rules of Procedure ("the Rules of Procedure") and HKIAC Supplemental Rules for HKIRC Domain Name Dispute Resolution Policy ("the HKIAC Supplemental Rules").

On the 17th day of February 2012, HKIAC acknowledged receipt of the Complaint.

On the 17th day of February 2012, the Respondent was notified that a Complaint had been filed and that the Respondent had 15 business days to submit a Response to the Complaint ("the Notification").

On the 14th day of March 2012, the HKIAC notified the Complainants that the Respondent had failed to submit a Response. As the Respondent did not file a Response in accordance with the time specified in the Rules, the HKIAC Supplemental Rules and the Notification, the HKIAC informed Complainants and Respondent by email about the default, stating that, as Respondent did not file a Response within the required time, the HKIAC would appoint the Panelist to proceed to render the Decision.

On the 22nd day of March 2012, the HKIAC notified the parties that the Panel in this case had been selected with Jeffrey Elkinson acting as the sole Panelist. The Panel has determined that the appointment has been made in accordance with the HKIAC Supplemental Rules. On that same date, the Panel received the file from HKIAC.
3. FACTUAL BACKGROUND

FOR THE COMPLAINANTS

The First Complainant is the owner of the Taobao/Tmall trademarks and the Second Complainant has joined in the complaint as the First Complainant’s representative in Hong Kong and as an authorized user with consequential rights in the trademark. The First Complainant has registered the marks “TMALL,” “TAOBO MALL,” “TAobao,” “TAO,” and Taobao.com in various jurisdictions, including Cambodia, Mainland China, European Union, Hong Kong, Japan, Korea, Macao, Mexico, Mongolia, New Zealand, Peru, Singapore, Switzerland and Taiwan. It has other trademark registrations pending on variations of the name in more than 18 jurisdictions. The First Complainant operates its business through a number of related companies, referred to as the Alibaba Group (“the Group”). It was originally founded in Hangzhou, China in 1999 and is a leader in the field of e-commerce with one of its member companies listed on the Hong Kong Stock Exchange since November 2007. “TAobao” was founded by the Group in May 2003 and is a business and consumer internet retail platform primarily focused on Chinese consumers. It is China’s largest online retail platform and as at the 30th June 2011, there were 485 million users, Taobao Marketplace, the internet platform, receives more than 50 million unique visitors daily. It is one of the world’s top 20 most visited websites. The Group operates two other platforms, www.taobao.com and www.taobao.com.cn under the same internet platform and it also has 2 search engine platforms, called Taobao.Mall/Tmall (www.tmall.com) and eTao (www.etao.com). In 2010, TaobaoMall was rebranded as Tmall, an abbreviation of First Complainant’s TaobaoMall trademark, and was given an independent website at www.tmall.com. There is a large amount of traffic to this website; 150 million hits in November 2010, 120 million hits in December 2010, with the number fluctuating in the course of the year, peaking in November 2011 with more than 300 million hits. All of the Group’s websites link it to its other online platforms. The Group’s success, having offices in 70 cities across China as well as in other major centers in Asia, North America and Europe, and its extraordinary revenues and revenue growth, has been the subject of much media attention
and articles have been published in the Wall Street Journal, Business Week and by Reuters at a date before the disputed domain name was registered by Respondent.

FOR THE RESPONDENT

The Respondent did not provide any response (nor participate in any way).

4. PARTIES’ CONTENTIONS -

COMPLAINANTS’ POSITION

Complainants point out that the website, to which the domain name resolves, actually contains links to Complainants’ www.tmall.com website and the website itself replicates closely the layout and colour scheme of the www.tmall.com website. It appears that the website is being operated as a retail trading platform in direct competition to the First Complainant’s TAOBAO websites. In addition, Complainants say that the Respondent’s name, TRADEWHOLESOME, could not be said to correspond to the disputed domain name and the evidence is that there is no apparent need for Respondent to use the derivatives TMALL or TAOBAOMALL.

Complainants’ position is that the disputed domain name is identical and/or confusingly similar to the trade or service marks in which the Complainants have rights. The Respondent has no right or legitimate interest in respect of the disputed domain name and the disputed domain name has been registered and is being used by the Respondent in bad faith.

RESPONDENT’S POSITION

The Respondent did not provide any response or participate in any way.
5. FINDINGS

Respondent is in default taking into account the facts set out above and that:-

(a) The Rules of Procedure provide at paragraph 5(e) as follows:-
"If a Respondent does not submit a timely Response, in the absence of exceptional circumstances as determined by the Provider at its sole discretion, the Arbitration Panel shall decide the dispute based upon the Complaint and evidence submitted therewith."

No exceptional circumstances have been raised and the Panel proceeds to decide the dispute based upon the Complaint and the submitted evidence.

(b) The language of the Proceedings – Paragraph 11(a) provides:-
"Unless otherwise agreed by the Parties, the language of the arbitration proceedings shall be in English for English.HK.domain name...."

There being no reason to determine that the proceedings should be conducted in anything other than English given the documentation is overwhelmingly in English, the language of the arbitration proceedings remain in English.

(c) Paragraph 4a of the Policy provides that the Complainants have the burden of proof.

In the circumstances, I find that:-

(i) The disputed domain name which was registered by the Respondent is identical and confusingly similar to a trademark or service mark in which the Complainant has rights;
(ii) The Respondent has no right or legitimate interest in respect of the disputed domain name;
(iii) The disputed domain name has been registered and is being used in bad faith.
(i) **Identical and confusingly similar** -

The Complainants have provided compelling and substantial evidence of its right in various derivatives of its marks and in particular of the TAOBAO/TMALL trademark. I have been provided with evidence of the trademark registrations which go back to 2003 and I am satisfied that those marks have acquired distinctiveness through their extensive use by the Complainants and their affiliated companies; that such marks would be immediately recognizable to consumers as being associated with the Complainants and their business. I have been provided with the Certificates of Registration of Trademarks in Hong Kong under the Trademarks Ordinance (Chapter 559) together with Registration Certificates for other TAOBAO/TMALL trademarks in the Asia Pacific region. I am satisfied that the small variation made by Respondent to First Complainant's mark, "*.com.hk," should be disregarded for the purpose of considering whether the domain name is identical or confusingly similar to the First Complainant’s trade or service mark. This addition to the disputed domain name does not avoid confusing similarity – see *Telstra Corporation Limited v. Nuclear Marshmallows-WIPO Case No. D2000-0003.*

I find that the domain name is confusingly similar and that Complainants have satisfied me in relation to this aspect of their complaint.

(ii) **Respondent has no right or legitimate interest in respect of the disputed domain name** -

Complainants have satisfied the Panel that the Respondent has no rights or legitimate interests in respect of the disputed domain name and there has been no contest to the Complainants’ position. I am satisfied that Complainants have satisfied their burden of proof but, in any event, given that the Complainants first used the TAOBAO/TMALL trademarks some 7 years before Respondent’s registration of the disputed domain name and in respect of TAOBAOMALL, by 2 years, and that Complainants have not licensed or authorized the use of those marks to Respondent, this shifts the burden of proof to Respondent to establish that it has such legitimate rights or interests in the disputed domain name. I do not in any event need to consider this aspect because, whilst paragraph 4(d) of the Dispute Resolution Policy sets how a Respondent can demonstrate
its rights to a legitimate interest in a disputed domain name in responding to a complaint, if there is no response then the matter ends with me being satisfied that Complainants have fulfilled their burden of proof. I so find and hold that the Respondent has no right or legitimate interest in respect of the disputed domain name.

(iii) Bad faith -
The Dispute Resolution Policy provides at paragraph 4(b) certain circumstances that if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith.

In particular at Paragraph 4(b)(iv)

"By using the Domain Name, the Registrant has intentionally attempted to attract, for commercial gain, Internet users to the Registrant’s web site or other on-line location, by creating a likelihood of confusion with the Complainant’s mark as to the source, sponsorship, affiliation, or endorsement of the Registrant’s web site or location or of a product or service on the Registrant’s web site or location."

The Complainants have presented sufficient evidence, and more, to demonstrate Respondent’s bad faith in this regard.

I am satisfied that Respondent would have been aware, given the evidence of the reknown of Complainants and the Group’s business and marks, that by establishing the disputed domain name that Respondent would gain some of Complainants’ business. The evidence of the contents of the web site support my view that Respondent would have sought to commercially gain by the confusion with the Complainants’ mark and compounded the confusion by the use of a logo closely resembling First Complainant’s registered trademark. To add insult to injury to the Complainants, the Respondent set out links to First Complainant’s www.tmall.com website and Respondent’s website itself closely resembles the layout and colour scheme of First Complainant’s www.tmall.com website. Identical to First Complainant’s website, Respondent’s website also displays a prominent red banner at the top of the main page, with the name of the website displayed
in white font at the top left hand corner of the banner together with a dark brown banner of tabs positioned directly underneath. I am satisfied that Complainant has shown that Respondent’s website was operated as a retail trading platform in direct competition to First Complainant’s TAOBAO websites. I am satisfied and find that the disputed domain name has been registered and is being used by the Respondent in bad faith.

6. CONCLUSIONS

For the reason set out above, the Panel finds that the disputed domain name registered by Respondent is confusingly similar to the First Complainant’s registered trademarks, TMALL and TMALL.COM, and that the Respondent has no rights or legitimate interest in respect of the disputed domain name and that the disputed domain name was registered and used in bad faith by the Respondent.

As a consequence of these findings, the Panel directs that the disputed domain name “tmall.com.hk” be transferred to the Second Complainant, Alibaba Group Services Limited.

DATED this 27th day of March, 2012

[Signature]
JEFFREY P. ELKINSON
PANELIST