.hk Domain Name Dispute Resolution
ARBITRATION PANEL DECISION

Complainant: Arena Pharmaceuticals GMBH
Respondent: Qi Fei Gao
Case Number: DHK-1300094
Contested Domain Name: belviq.hk
Panel Member: Peter Bullock (Sole Panelist)

1. Parties and Contested Domain Name

The complainant is Arena Pharmaceuticals GMBH (the "Complainant") with registered address at 6th Wincome Centre, No. 39 Des Voeux Road Central, Hong Kong.

The respondent is Qi Fei Gao (the "Respondent") with no registered address.

The disputed domain name is "belviq.hk" (the "Domain Name") which was registered in Hong Kong with the Hong Kong Internet Registration Corporation Ltd. (the "HKIRC") on 29 June 2012.

2. Procedural History

The Complainant filed a complaint in this matter with the Hong Kong International Arbitration Centre (the "HKIAC") on 21 March 2013 (the "Complaint") pursuant to the HKIRC Domain Name Dispute Resolution Policy (the "Policy") and its Rules of Procedure. The HKIAC notified the registrar of the Domain Name of the proceedings by email on 21 March 2013. On 25 March 2013 the registrar of the Domain Name notified the HKIAC that the proper respondent to the dispute is the Respondent.

The HKIAC sent notification of commencement of proceedings, the Complaint and its exhibits to the Respondent by email on 5 April 2013. Process has been duly served and no response was submitted by the Respondent on or before the prescribed deadline of 26 April 2013. The HKIAC informed the Respondent of the same by email on 29 April 2013.

On 29 April 2013 the HKIAC informed the parties by email that a sole panelist, Peter Bullock, had been appointed to the Panel.
3. Factual Background

The Complainant

The Complainant, a Swiss company, is a wholly-owned subsidiary of Arena Pharmaceuticals, Inc. ("Arena US") (collectively the "Arena Group"). Arena US focuses on operation in the United States, specialising in discovering, developing and commercializing new drugs. Meanwhile the Complainant oversees the business and operations outside of the United States, and the business ranges from manufacturing to managing the global supply chain.

The Complainant holds trademark rights in the word "Belviq" (the "Trademark") in 31 jurisdictions, the name for a new drug containing lorcaserin developed by the Complainant for weight management ("Belviq"). The Complainant asserts that the Trademark was created by Arena Group specifically to be used as the trademark for their new drug.

In preparation for selling Belviq for profit, Arena Group publicised research and development information about its new drug on its official website and its annual reports which are widely available to the public. News of Belviq's approval by the US Food and Drug Administration ("FDA") was broadcast in the US, UK, Germany, France, Korea, China and Hong Kong's media as the first weight-loss pill to be approved by the FDA in the last 13 years. Despite the publicity, Belviq is not available on the market yet as there are approvals pending in various jurisdictions.

A domain name containing the Trademark, "belviq.com", was registered by the Complainant on 11 June 2011. Meanwhile the Complainant registered the Trademark in Hong Kong on 8 May 2012.

The Respondent

The Respondent registered the Domain Name on 29 June 2012 and the website of the Domain Name is currently inactive. A representative of the Complainant contacted the Respondent on 26 September 2012 at the email address listed at the HKIRC and no response was received. Other than the Respondent's name and email, no further information about the Respondent is available.

4. Parties' Contentions

The Complainant

The Complainant asserts the following:

- The Domain Name contains a mark which is identical or confusingly similar to the Complainant's Trademark.
• The Respondent has no rights or legitimate interests in respect of the Domain Name on the grounds that the Respondent: (i) has neither acquired trademark nor service mark rights in the Domain Name; (ii) has not made a legitimate non-commercial or fair use of the Domain Name; and (iii) has no connection or affiliation with the Complainant and has received no licence or consent, whether express or implied, from the Complainant to use the Trademark.

• The Respondent has used the Domain Name in bad faith due to (i) the registration of the Domain Name with knowledge of the Complainant's reputation in its Trademark; (ii) the Respondent's failure to reply to the Complainant's queries; and (iii) inactivity of the website associated with the Domain Name.

The Respondent

The Respondent did not file a response within the stipulated time.

5. Discussion and Findings

According to paragraph 4(a) of the Policy which is applicable hereto, the Complainant has the burden of proving that:

(i) the Domain Name is identical or confusingly similar to a trademark or service mark in Hong Kong in which the Complainant has rights; and

(ii) the Respondent has no rights or legitimate interests in respect of the Domain Name; and

(iii) the Domain Name has been registered and is being used in bad faith.

(1). Identical/confusing similarity

The Complainant has produced evidence that it has acquired rights in the Trademark as early as 22 June 2011. The Panel accepts the evidence adduced by the Complainant and finds that the Complainant has trademark rights in the Trademark in various jurisdictions including Hong Kong.

The Panel accepts the Complainant's contention that the distinctive and dominant element of the Domain Name is identical to the Trademark. The fact that the Trademark is used in the Domain Name in its entirety would likely mislead the public to associate the Domain Name with the Complainant or Belviq.

Furthermore, "belviq" is a unique word created by the Complainant. Since "belviq" cannot be considered to be a generic term, the Panel is of the view
that the Respondent used the word "belviq" in the Domain Name to create an impression of association with the Complainant.

In relation to the use of ".hk" in the Domain Name, it is now well established that the generic top-level domain may be disregarded when evaluating whether a Domain Name name is identical or confusingly similar (Den Braven Sealants B.V v. Bross Holding AD WIPO Case No. D2012-2163).

Thus the Panel is satisfied that the requirement of paragraph 4(a)(i) of the Policy is met.

(2). Rights or Legitimate Interests of Respondent

According to paragraph 4(d) of the Policy, the Respondent may establish rights to or legitimate interests in the Domain Name by demonstrating any of the following:

- the Respondent's use of, or demonstratable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services in Hong Kong; or
- the Respondent has been commonly known by the domain name the Respondent is holding; or
- the Respondent has trademark or service mark rights over the mark that is identical to the Domain Name the Respondent is holding; or
- the Respondent is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

As the Complainant correctly points out, the Respondent has the burden of proof once the Complainant demonstrates prima facie evidence that the Respondent lacks rights or legitimate interests.

The Complainant produces evidence that the Respondent fails to make active use of the Domain Name. The Panel finds that the Respondent's failure to make active use of the Domain Name is not a bona fide offering of goods or services (Electro-Motive Diesel, Inc. v. Focus Sevice, Inc WIPO Case No. D2012-1848).

The Complainant's lack of meaningful internet search results of the Respondent or his use of the Domain Name, while not necessarily conclusive, is a strong indication that the Respondent has not been commonly known by the Domain Name. Based on Marriott International Inc. v. Thomas Burstein and Miller WIPO Case No. D2000-0610, no legitimate interest can be
established when there is no evidence that the Respondent is commonly known by the Domain Name.

The Complainant asserts that it has never authorised, consented to, licensed, transferred or assigned the use of the Trademark to the Respondent at any time. Meanwhile there is no evidence to suggest the Respondent has any rights to the Trademark in any way.

Having been presented with a prima facie case by the Complainant and in the absence of a reply from the Respondent, there is a lack of evidence before the Panel to suggest that the Respondent has established rights or legitimate interests based on any of the grounds mentioned above.

In conclusion, the Panel is satisfied that the condition under paragraph 4(a)(ii) is met.

(3). **Bad faith**

For the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy sets out four non-exhaustive circumstances which shall be evidence of registration and use of a domain name in bad faith. These are as follows:

- circumstances indicating that the domain name was acquired or registered primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly related to the domain name; or

- the Respondent has registered the domain name in order to prevent the Complainant from reflecting the mark in a corresponding domain name, provided that the Respondent has engaged in a pattern of such conduct; or

- the Respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

- by using the domain name, the Respondent has intentionally attempted to attract for commercial gain, internet users to the Respondent's website or other online 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 Respondent's web site or location.

From the abundance of media coverage and internet search results produced by the Complainant, it is indisputable that news regarding Belviq and its
FDA approval was extensively publicised around the world, including Hong Kong and China, in late June 2012. The Respondent registered the Domain Name around the same time when the news announced FDA’s approval of Belviq. An inference can be drawn from the Complainant’s presence on the internet and the timing of the registration of the Domain Name that the Respondent knew, or at least should have known, of Belviq and the Trademark prior to registration. Accordingly the Panel finds that the Respondent registered the Domain Name in bad faith.

The Panel in Telstra Corporation Limited v Nuclear Marshmallows (WIPO Case No. D2000-003) acknowledged that bad faith may not necessarily be a positive action; inactivity by the Respondent can also be construed as bad faith. In the circumstances of the present case, the Respondent’s failure to reply to the Complainant’s email and passive holding of the Domain Name amount to using the Domain Name in bad faith.

Therefore the Panel concludes that the Respondent has registered and used the Domain Name in bad faith, satisfying paragraph 4(a)(iii) of the Policy.

6. Conclusions

In light of the foregoing paragraphs, the elements of paragraph 4(a) of the Policy are present in this case. The Panel orders the Domain Name to be transferred to the Complainant.

Dated [3rd May] 2013

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Peter Bullock