

NATIONAL ARBITRATION FORUM

DECISION

Wynn Resorts Holdings, LLC v. Swen Goebbels
Case number: FA1003001311077

PARTIES

The complainant is **Wynn Resorts Holdings, LLC** (“Complainant”), represented by **Ryan Bricker, of TOWNSEND and TOWNSEND and CREW LLP**, California, USA. The respondent is **Swen Goebbels** (“Respondent”), Dr. Bernhard-Klein-Straße 5, 52078 Aachen, Germany.

DOMAIN NAME AND DOMAIN ASSIGNMENT ORDER

The subject of this procedure are the domain names **<surrenderlasvegas.com>**, **<switchbeachclub.com>** and **<switchbeachclub.net>**. The domain registration office is **1&1 Internet AG**, Brauerstraße 48, 67135 Karlsruhe, Germany.

COMPLAINTS PANEL

The undersigned confirms that he was completely unbiased and independent in making his decision and that, to his knowledge and belief, there are no facts or circumstances, past, present or expected in the foreseeable future, which require disclosure, which in the eyes of either party or both parties by their very nature could give rise to doubts about his independence.

Dr. Reinhard Schanda as a member of the committee.

PROCEDURE

The complainant submitted the notice of complaint via email to the National Arbitration Forum on March 2, 2010. On March 3, 2010, the National Arbitration Forum received the same notice of complaint by mail. The complaint was submitted in both English and German.

In an email dated March 4th, 2010, the domain registry 1&1 Internet AG confirmed to the National Arbitration Forum that the domain names **<surrenderlasvegas.com>**, **<switchbeachclub.com>** and **<switchbeachclub.net>** were registered with it and that the respondent is the current domain owner of the domain names and that the Uniform Domain Name DISPUTE RESOLUTION POLICY, hereinafter referred to as the “Guideline”, is part of the registration agreement and therefore applies to the domain names in question here. With this email, the domain registry 1&1 Internet AG also provided the National Arbitration Forum with a current excerpt from the who is database for the domain names **<surrenderlasvegas.com>**, **<switchbeachclub.com>** and **<switchbeachclub.net>** and informed the National Arbitration Forum that the language of the registration agreement is German.

On March 10, 2010, the respondent was informed by the National Arbitration Forum in German that a complaint procedure had been initiated based on the complaint received. The procedural notice was sent to the respondent by e-mail, post and fax, with a copy via e-mail to all technical administrative and billing contacts according to the respondent's registration confirmation. The notice of appeal was therefore duly served. The respondent was further informed that he had the opportunity to submit a written response within 20 days of the initiation of this complaint procedure, i.e. until March 30, 2010. In addition, the respondent was informed of the consequences of default.

The respondent submitted a written response to the complaint on March 29, 2010. In response, the complainant submitted a supplementary submission to his complaint on April 5, 2010, which was received on time in accordance with the supplementary statutes.

In accordance with the complainant's request that the complaint procedure be decided by an individual panelist, the National Arbitration Forum on April 6, 2010 appointed Mr. Dr. Reinhard Schanda appointed as individual panelist.

COMPLAINT REQUEST

The complainant requests the transfer of the disputed domain names from the respondent to the complainant.

SUBMISSIONS OF THE PARTIES

A. Complainant

The complainant is the sole shareholder of Wynn Las Vegas LLC, which owns and operates the “Wynn Las Vegas” – Resort Hotel – Casino and the “Encore at Wynn Las Vegas”. Wynn Las Vegas, LLC also owns and operates a number of restaurants, bars and lounges, as well as entertainment and recreational services at Wynn Las Vegas and Encore. These include, among other things, the “Switch”, a luxurious facility with a restaurant, bars and ballroom, soon the “Switch Beach Club” and in the near future also the “Surrender” nightclub, which is scheduled to open in the course of 2010. Wynn's commitment Las Vegas in building the highest quality casino resort services has resulted in consumer recognition of Wynn's brands as symbols of luxury and has earned Wynn a strong reputation worldwide. This includes multiple 5-star ratings for its suites and restaurants.

The established reputation of the complainant and its subsidiaries was already recognized by a complaints panel in 2007.

The complainant states in his complaint that, among other things, he has been the owner of the American trademark “SWITCH” for “Restaurant, Bar and Cocktail Lounge Services, providing banquet and social function facilities for special locations” since July 21, 2009, which has the registration number 3,658,562 is registered in the United States Patent and Trademark Office.

The complainant further submits that he applied for the trademark “SURRENDER” in class 41 for nightclub services on September 22, 2009 under serial number 77832536. At about the same time, Complainant began using the name “Switch Beachclub” for a new swimming pool lounge and restaurant service. This project became public in an interview in October 2009. Shortly thereafter, the respondent registered the three domain names at issue, which contain the trademarks and names “switch”, “switch beachclub” and “surrender”. The three domain names in question were parked

by the respondent on November 22, 2009 without any content and offered for auction on sedo.de. The domain names < surrenderlasvegas.com > , < switchbeachclub.com > each by USD 9,000.00 and the domain name < switchbeachclub.net > by USD 5,000.00.

The complainant submits that he has spent considerable resources on advertising and promoting the brand and name Switch and Switch Beachclub. Customers and the media would know the brand and name Switch as well as the complainant's well-known "Switch" restaurant. The restaurant has also been praised several times by restaurant critics. With respect to the trademark "Surrender," appellant filed an application to register that trademark with the United States Patent Office on September 22, 2009 and was currently awaiting approval. Regardless of this, the complainant asserts customary rights to this trademark. Because of the planned opening of his Surrender nightclub in Las Vegas in May 2010, considerable amounts of money were spent on development. The complainant assumes conversion costs of USD 65 million. In addition, the announced nightclub received national press coverage in publications such as the New York Post and Las Vegas Weekly Magazine. The resulting recognition of the brand and the high costs of promoting this brand are evidence that the complainant has acquired customary rights to the name Surrender.

The complainant argues that the domain names at issue are identical or confusingly similar to the brands and names Switch, Switch Beachclub and Surrender. The respondent's inclusion of the term "Las Vegas" in the domain name < surrenderlasvegas.com > **is irrelevant because "Las Vegas" is a geographical description.** In any case, this addition is not suitable for distinguishing the domain name in question from the complainant's trademark rights, especially since the latter in Las Vegas has its place of business. The same applies to the addition of the term "beach club".

The complainant further argues that the respondent has no rights or legitimate interests in the domain names in question. The domain names are parked by the respondent without content and put up for auction at a price that significantly exceeds the respondent's expenses. The respondent did not use the domain names in question for a bona fide offer of goods or services and does not appear to have any intention to do so. Furthermore, the respondent does not use the domain names for non-commercial or other appropriate purposes. The complainant also did not authorize the respondent to use or reproduce any of his trademarks. The respondent is also not commonly known by the names of the contested domain names. The respondent therefore has no legitimate rights or interests in these domain names.

Finally, the complainant submits that the respondent undoubtedly had knowledge of the complainant's rights and trademarks when registering the domain names in question. According to the complainant, the respondent also knew from the media coverage that the complainant would spend approximately USD 65 million to build the beach club, include the name Switch in the design and a new nightclub called Surrender in his to integrate the business. In view of this, the respondent could not claim that he had no knowledge of the complainant's rights and trademarks.

The mere fact that the respondent registered all of the domain names in question on one day is enough evidence of the respondent's dishonest intention. In addition, two of the registered domain names would contain one and the same trademark, which would also prove the respondent's dishonest intention. There is therefore no doubt for the complainant that the respondent registered the domain names in question dishonestly and has since intended to exploit them commercially by selling them to the complainant.

B. Respondent

The respondent doubts the clear assignment of the names Switch, Switch Beachclub and Surrender to the complainant. According to the respondent, the terms switch and surrender are simple, general words in the English language that have not received any general added value through the use of a historically composite trademark. The English word "switch" has several meanings in German. None of these meanings indicate any connection to a bar or restaurant operated by the complainant. A Google search yielded 241 million results for the term "switch". Up to page 10, the respondent found no entries in connection with the plaintiff. According to the respondent, such general and common words as "switch" and "surrender" are not suitable for being registered as a trademark. The same would apply to the term "surrender". This term is also a general, ordinary word in the English language without a historical meaning in any known context. According to the respondent, the meaning of this term cannot be seen in any logical connection with the bars and restaurants operated by the complainant. A Google query yielded similar results and revealed no connection to the complainant. This term is also a general, ordinary word in the English language without a historical meaning in any known context. According to the respondent, the meaning of this term cannot be seen in any logical connection with the bars and restaurants operated by the complainant. A Google query yielded similar results and revealed no connection to the complainant. This term is also a general, ordinary word in the English language without a historical meaning in any known context. According to the respondent, the meaning of this term cannot be seen in any logical connection with the bars and restaurants operated by the complainant. A Google query yielded similar results and revealed no connection to the complainant.

The respondent notes that he cannot find an entry for the term "Switch Beachclub" in the trademark register. The respondent contradicts the argument that he was aware of the complainant's preparations at the time of registration. In this context, the respondent particularly denies that the complainant has acquired a customary right to the term "surrender". The complainant also lacked evidence that would prove that the "surrender" brand was well known at the time of registration.

The respondent denies having registered the domains in question with bad intentions, but admits to owning over 100 different domain names. However, he denies trading and just wants to keep all options open for the future. He currently doesn't have time to actually realize these projects. As long as he paid for these domains honestly, they would belong to him. To date he has never violated any trademark rights. Domain parking at Sedo.de is quite common. The price was set so high because he had no serious intentions of selling.

C. Further submissions

In his supplementary submission of April 5, 2010, the complainant comments on individual points in the respondent's response to the complaint, but essentially repeats his submissions according to the complaint.

REASONS FOR DECISION

Pursuant to Section 15(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Procedural Order"), the Complaint Panel shall hear the complaint based on the parties' submissions, the documents filed, as well as the Policy, the Procedural Order and any rules and principles of law that it deems applicable keeps deciding.

Section 4 (a) of the Directive sets out three requirements that the complainant must demonstrate to justify a finding that the respondent's domain name should be transferred to the complainant:

- (1) The registered domain name is identical or confusingly similar to a trademark or service mark from which the complainant derives rights;
- (2) The respondent has no right or legitimate interest in the domain name;
- (3) The respondent registered the domain name in bad faith and continues to use it in bad faith.

Identity or likelihood of confusion with a trademark from which the complainant derives rights.

The domain names in question <surrenderlasvegas.com> , <switchbeachclub.com> and <switchbeachclub.net> are not identical to the trademarks protected by the complainant, the component “.com” or “.net” is important when assessing the likelihood of confusion between However, domain names and brands are irrelevant and are therefore not taken into account. *See Williams-Sonoma, Inc. v. Kurt Fees c/o K Fees* , Complaint No. FA 937704 (NAF dated April 25, 2007) (in which the domain name <potterybarn.org> is found to be identical to complainant's brand name POTTERY BARN was found to be because “only the ‘generic top-level domain’ (“gTLD”) “.org” was appended and the spaces between the words were removed.”); *see also General Mills Inc. v. Keyword Marketing, Inc.* , Complaint No. FA 921284 (NAF dated March 30, 2007) (in which the domain name <fruitroll-ups.com> is found to be identical to complainant's brand name FRUIT ROLL- UPS was found).

This also applies to the merely descriptive components “Las Vegas” and “beach club”. These two components are also not suitable for reducing the likelihood of confusion with the complainant's trademarks; on the contrary, the addition of the components Beach Club and Las Vegas are more likely to increase the likelihood of confusion with the complainant's trademarks. The insertion of such descriptive components into a domain that is otherwise identical to a trademark is not sufficient to make the domain distinctive.

As a result, there is a risk of confusion between the domain names at issue and the trademarks registered in favor of the complainant.

Rights or legitimate interests in the domain name.

The Respondent is neither an agent nor a licensee of the Complainant. It is also not clear that the respondent used the domain names in question for a bona fide offer of goods or services before notification of the initiation of the complaint procedure or that he demonstrably prepared such a use. *See Telstra Corp. Ltd. v. Nuclear Marshmallows* , WIPO Case No. D2000-0003 (WIPO dated Feb. 13, 2000) (whereby the Respondent had no rights or legitimate claims to the use of the domain name because the Respondent had no right to use the Complainant's trademark license nor had any other permission); *Alta Vista Company vs. Jean-Daniel Gamanche* , Case No. FA 95249 (NAF dated Aug. 17, 2000) (whereby the Respondent did not have a license to use the Complainant's brand name and therefore had no right to or legitimate interest in the domain name).

As far as can be seen, the respondent has not acquired a corresponding trademark or service mark and is not known as an individual under the domain names in question, in particular he does not have the surname surrender las vegas or switch beachclu. *See Gallup v. Amish Country Store* , Case No. FA 96209 (NAF dated Jan. 23, 2001) (Respondent has no claim to a domain name containing another's brand name if Respondent is not known by that brand name).

Furthermore, it is not apparent that the respondent is using the domain name in a legitimate, non-commercial or otherwise respectable manner without any intention to make a profit and without the intention to entice consumers in a misleading manner or to denigrate the brand in question. The fact that the respondent is currently not conducting any of his own activities under the domain names <surrenderlasvegas.com> , <switchbeachclub.com> and <switchbeachclub.net> and is offering these for auction is a further indication that he has no legitimate interest in the use of the domain name. *See Abbott Labs. v. United Worldwide Express Co.* , Case No. D2004-0088 (WIPO of April 7, 2004) (“the use of the domain name ... for a website on which both the complainant's products and directly competing products are sold does not constitute the offering of goods in good faith”); *Nikon, Inc. and Nikon Corp. v. Technilab, Inc.* , Case No. D2000-1774 (WIPO dated Feb. 26, 2001) (which states that the “use of the trademark owner's brand name to Offering and selling competitive products does not constitute a legitimate use”; *Whirlpool Properties, Inc. & Whirlpool Corp. v. Ace Appliance Parts and Service* , Case No. FA 109386 (NAF dated 24.May 2002) (confirming that Complainant's use of the WHIRLPOOL and KITCHENAID brand names to sell parts and services for competing products was not a bona fide offering of products or services); *Nat'l Ass'n of Professional Baseball Leagues v. Zuccarini* , Case No. D2002-1011 (WIPO dated Jan. 21, 2003). *See also Dollar Financial Group, Inc. v. Mobile Internet Technologies, LLC* , Case No. FA 363953 (NAF dated Dec. 28, 2004) (“Respondent has not made any use of the domain name... Passive ownership has no use in connection with that in good faith the offering of products or services in accordance with Directive ¶ 4(c)(i) ... applies”); *Teachers Insurance and Annuity Association of America v. Wreaks Communications Group* , Case No. D2006-0483 (WIPO dated June 15, 2006).

As a result, the complaint panel comes to the conclusion that the respondent has no rights or legitimate interests in the domain name in dispute.

Bad faith registration and use

In order for a complaint to be successful, the complaint panel must be convinced that the domain name was not only registered in bad faith at the time, but is also being used in bad faith throughout the entire period.

Based on the complainant's submission and on the basis of the available documents, the complaint panel therefore examined, based on the provision of Section 4 (b) of the Directive, whether circumstances indicate that the respondent registered or acquired the domain names primarily with the intention of further Consequently, to sell, license or otherwise transfer the property to the complainant or to one of its competitors for a fee. Such circumstances were not identified by the panel, although they cannot be ruled out.

Since the Respondent is a natural individual, in accordance with Section 4 (a) (iii) of the Directive, it cannot be assumed that the Respondent registered the domain name primarily with the intention of hindering the business of a competitor.

It was therefore necessary to examine whether the respondent may have registered the domain name with the intention of preventing the owner of a service mark from reproducing it in a domain name corresponding to its mark, or whether the respondent intentionally and with the intention of making a profit attempted to use the domain name To direct Internet users to its site or to any other online presence in which the Respondent has created a likelihood of confusion with the Complainant's mark as to the source, authorship, affiliation or endorsement of its website or the products or services offered by on its website.

Although the respondent did not attempt to sell the domain names to the complainant, he did use the domain names in a manner that can be viewed as bad faith and at the same time is an indication that the domain name was also registered in bad faith. It is inconceivable for the complaint panel that the respondent could use the domain names in dispute in any way without giving the false impression of a connection with the complainant. The complaint panel also assumes that the respondent was aware of the trademarks "SURRENDER" and "SWITCH" at the time of registration. This impression is reinforced by the fact that the respondent also uses the domain names <switchbeachclub.com> and <switchbeachclub. See *VICORP Restaurants, Inc. v. Paradigm Technologies Inc. c/o Arden Bohanec*, Case No. FA 702527 (NAF dated June 21, 2006). See also *Megatrax Production Music, Inc. v. Fulltone*, Case No. FA 649297 (NAF dated Apr. 12, 2006) ("The Panel finds that Respondent registered the domain name <megatracks.com> with intent to deceive because the Respondent has not made use of the domain name since registration in December 1999 and has not demonstrated that he has made demonstrable preparations for the use of the domain name."); *Teachers Insurance and Annuity Association of America v. Wreaks Communications Group*, Case No. D2006-0483 (WIPO dated June 15, 2006).

Due to the familiarity of the trademarks and the Complainant's intentions and the fact that the Respondent does not deny having been in Las Vegas during this time, the Complaint Panel is of the opinion that the Respondent was more aware of the trademarks "SWITCH" and "SURRENDER" than he was the domain names <surrenderlasvegas.com>, <switchbeachclub.com> and <switchbeachclub.net> were registered. See *AT&T Corp. v. Asia Ventures, Inc.*, Case No. D2005-1012 (WIPO dated November 14, 2005) (the use of the trademark in the domain to direct traffic to the Complainant's competitors' site demonstrated the Respondent's intent to deceive); *Gannett Co., Inc. v. Henry Chan*, Case No. D2004-0117 (WIPO April 8, 2004) (ibid.); *Edmunds.com, Inc. v. Ult. Search, Inc.*, Case No. D2001-1319 (WIPO, dated February 1, 2002) (ibid.); *National City Corporation v. MH Networks LLC*, Case No. D2004-0128 (WIPO June 15, 2004) (ibid.); *Kabushiki Kaisha Hitachi Seisakusho (Japan Corporation), d/b/a Hitachi, Ltd. v. DRP Services*, Case No. D2004-0344 (WIPO dated July 5, 2004) (ibid.); *Nat'l Ass'n of Professional Baseball Leagues v. Zuccarini*, Case No. D2002-1011 (WIPO dated January 21, 2003) (ibid.).

The Complaint Panel is therefore satisfied that the Respondent registered the domain names <surrenderlasvegas.com>, <switchbeachclub.com> and <switchbeachclub.net> in accordance with Section 4(b)(i) of the Policy primarily with the intention of benefiting the Complainant, which is the owner of trademark rights, or to a competitor of the complainant to sell, rent or otherwise transfer the domain names for a fee that is unreasonably high compared to his expenses in direct connection with the domain names or to prevent the complainant from owning a domain of this to set up a name.

DECISION

After all three elements required by the ICANN policy have been met, the Complaint Panel finds that the Complainant's request is **APPROVED**.

Accordingly, the complaint panel orders the transfer of the domain names <surrenderlasvegas.com>, <switchbeachclub.com> and <switchbeachclub.net> from the respondent to the complainant.

Dr. Reinhard Schanda, individual panelist Dated:
April 20, 2010

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