



Asian Domain Name Dispute Resolution Centre

hong kong

(Hong Kong Office)

## ADMINISTRATIVE PANEL DECISION

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<b>Case No.</b>	HK-1400573
<b>Complainant:</b>	<b>Alibaba Group Holding Limited</b>
<b>Respondent:</b>	<b>Serhio Zaiman</b>
<b>Disputed Domain Name(s):</b>	<b>&lt;rutabao.com&gt;</b>

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### 1. The Parties and Contested Domain Name

The Complainant is Alibaba Group Holding Limited, of Fourth Floor, One Capital Place, P.O. Box 847, George Town, Grand Cayman, Cayman Islands, British West Indies, having its principal place of business in the People's Republic of China (hereinafter referred to as "Complainant").

The Respondent is Serhio Zaiman, of Linejanya 14-13, Kaliningrad, 236016, Russia (hereinafter referred to as "Respondent").

The domain name at issue is <rutabao.com>, registered by Respondent with Rebel.com, 300-12 York St., Ottawa, Canada K1N 5S6 (the "Registrar").

### 2. Procedural History

On 12 February 2014 Complainant filed the Complaint in this matter concerning the domain name at issue. On that same date The Asian Domain Name Dispute Resolution Centre (hereinafter referred to as the "Centre") notified the Registrar of the filing of the complaint and requested that the Registrar confirm that the domain name at issue was registered with the Registrar, that the identified Respondent is the registrant of the domain name, and that the Registrar had received a copy of the Complaint. On 17 February 2014, the Centre notified Complainant that the fee required for filing a Complaint with the Centre had been received. On the same date, the Registrar notified the Centre that, with the privacy protection removed, the registrant of the domain name was Serhio Zaiman. On 19 February 2014, the Centre sent the Complainant a Notice of Deficiency, requesting that Complainant amend its Complaint to identify the registrant underlying the privacy protection and to serve the Complaint on the identified registrant.

On 20 February 2014, Complainant filed a Revised Complaint with the Centre. On 25 February 2014, the Centre served a written notice of Complaint on Respondent. On 1 March 2014, Respondent filed an objection with the Centre, stating that the Complaint exceeded the word limitations set out in Article 13 of the ADNDRC Supplemental Rules. On 18 March 2014,

Respondent filed, without objection, a Response which exceeded the word limitations set out in Article 13 of the ANDNRC Supplemental Rules. On that same date the Centre sent an Acknowledgement of Receipt of the Response. On 20 March, 2014, Complainant filed an objection to the Response in that Complainant alleged that the Response had not been timely filed. On 26 March 2014 the Complainant submitted Supplemental Submissions and Annexures. On 27 March 2014 Respondent objected to the receipt of Complainant's Supplemental Submissions and Annexures and stated Respondent's intent to submit supplemental pleadings. On 1 April 2014, Respondent submitted a Supplemental Response.

On 8 April 2014 the Centre appointed M. Scott Donahey as Presiding Panelist, and Gary Soo and Houston Putnam Lowry, Chartered Arbitrator, as co-Panelists. On that same date the Centre transferred the file to the panel. As the registration agreement was in the English language, the Panel finds that the language of the proceedings is English. Uniform Rules, Rule 7(a).

On 14 April 2014 the parties jointly requested that the Parties suspend the proceedings for 30 days in order to allow the parties to pursue settlement. On 15 April 2014, the Panel issued Administrative Panel Order No. 1, in which the Panel suspended the proceedings until 14 May 2014 at the mutual request of the parties and extended the Panel's time in which to issue a decision in this matter to and including 22 May 2014. On 20 May 2014, Complainant requested a further suspension of the proceedings for six months in order to permit the parties to pursue settlement. On 21 May 2014, Respondent objected to any further extension of the proceedings, but in the alternative for a suspension of 30 days. On 22 May 2014, the Panel issued Administrative Panel Order No. 2, extending the suspension of the proceedings until 21 June 2014 and indicated that this was the final suspension which would be granted.

On 24 June 2014, the Centre received a request from the Complainant to proceed with the matter.

First Complainant, and thereafter Respondent, submitted unsolicited supplemental submissions for the Panel's consideration. Under Uniform Rule 15, the Panel, in its sole discretion, may request further statements or documents; no provision is made for the parties to unilaterally submit statements or documents in addition to the complaint or response. Therefore the Panel is not obligated to accept such additional submissions. Nevertheless the Panel exercises the general powers granted to it under Uniform Rules 10(a) and (d) to conduct the proceeding in such manner as it considers appropriate and to determine the admissibility of evidence to accept the additional submissions submitted by the parties to this proceeding.

### **3. Factual background**

#### **a. Complainant's Factual Allegations**

Complainant was founded in Hangzhou, China in 1999, and is now recognized as one of the global leaders in electronic commerce. Through its affiliates, Complainant operates a global electronic marketplace at [www.alibaba.com](http://www.alibaba.com) (domain name registered on 18 November 2009) and a second marketplace aimed at China and primarily Chinese language users at [www.alibaba.com.cn](http://www.alibaba.com.cn) (domain name registered on 19 October 1999) and [www.1688.com](http://www.1688.com) (domain name registered on 19 November 2009). Through the end of 2012, [www.alibaba.com](http://www.alibaba.com) had approximately 36.7 million registered users from around the globe and Complainant's Chinese marketplaces had approximately 77.7 million registered users.

In May 2003, Complainant founded the "taobao" brand in China at [www.taobao.com](http://www.taobao.com) as a consumer-to-consumer ("C2C") marketplace. It is now one of the largest Chinese language

consumer retail platforms and as of March 2013 the Taobao marketplace had over 760 million product listings.

In 2009 the Taobao brand transaction volume exceeded US\$ 29 billion. Complaint, Annex 4. Page views of the [www.taobao.com](http://www.taobao.com) site originating from computers located in Russia have been steadily growing and as of September 2013 had reached more than 2,600,000 per month. Complainant has spent considerable sums in the promotion of its [www.taobao.com](http://www.taobao.com) web sites in Russia. Complainant has registered the TAOBAO trademark in a number of different countries, including in Russia. Complaint, Annexes 2 and 3.

The domain name at issue was originally registered on 20 November 2009. Complaint, Annex 1. In May 2010, Complainant first discovered that the domain name at issue resolved to a web site at which retail goods were offered for sale. On 18 May 2010, Complainant's counsel, wrote Respondent a cease and desist letter to Respondent. On 15 June 2010, Respondent sent a letter stating that Respondent had been authorized to use the domain name, but that he would soon cease doing so. Neither of these communications was attached as an annex either to the Revised Complaint or to Complainant's Supplemental Submission.

Respondent is a member of Complainant's "TOP scheme," pursuant to which respondent is permitted to link its web site to Complainant's web site, but which does not permit Respondent to use Complainant's TAOBAO mark. Although a "former junior employee" of Complainant is purported to have authorized Respondent to use the domain name <rutabao.ru> in correspondence furnished by Respondent to Complainant, but not attached to Complainant's submissions as an annex, Complainant did not authorize the former employee to make this concession. In any event, the domain name for which permission was granted is not the domain name at issue, and Complainant, as owner of the mark, can withdraw any such consent.

#### **b. Respondent's Factual Allegations**

Respondent alleges that beginning in late 2009 Respondent and Complainant became involved in a business relationship, pursuant to which Respondent would introduce Complainant's web sites and products to the Russian Market. Response, Annexes 1, 2, 13, and 15. Their business relationship continued through 2010 (Response, Annexes 3, 4, 5, 6, and 7), 2011 (Response, Annex 8), 2012 (Response, Annex 9), and at least into late 2013 (Response, Annexes 10, 11, and 12). During the course of this relationship, Complainant described Respondent as its business partner. Response, Annexes 6 and 7. On one occasion Response asked for and received permission to use the domain name [www.rutabao.com](http://www.rutabao.com) in conjunction with business in Russia. Response, Annex 2. On another occasion Respondent asked for and received permission to use the domain name <rutabao.ru>. Response, Annex 15. Respondent also sought permission to pay for advertisement in the Russian market at its own expense. Response, Annex 4.

#### **4. Parties' Contentions**

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

The domain name at issue consists of Complainant's TAOBAO mark and the .com prefix, and is therefore identical to Complainant's mark.

Complainant asserts that the domain name at issue was registered without Complainant's authorization, that Respondent agreed to cease its use, and that Respondent reneged on this agreement, made in writing in an exchange of correspondence with Complainant's counsel.

Respondent was not authorized to use the domain name at issue by any employee of Complainant with the authority to do so, and that Respondent therefore had no rights or legitimate interests in respect of the domain name at issue.

Respondent is using the domain name to resolve to a web site which links to Complainant's web site and through which practice Respondent is deriving profits. The use of the domain name at issue is an attempt to profit from the good will established by Complainant in its TAOBAO trademark and as such constitutes bad faith.

## B. Respondent

Respondent argues that Respondent sought and received permission to register the domain name at issue from Complainant in order to use it to further their mutual business arrangement, and that Respondent has used the domain name at issue to the benefit of both parties. Respondent alleges that Respondent and Complainant continued their business relationship at least well into late 2013 and even up to the domain name being locked upon the filing of the Complaint in this matter.

Respondent has spent considerable time and resources in promoting Complainant's business in Russia, which has redounded to the financial benefit of both parties to the business relationship.

Respondent took no steps in relation to the registration of domain names which utilized Complainant's trademark without first seeking permission from Complainant and having been given such permission.

Accordingly, Respondent asserts that Complainant has failed to prove its case.

## 5. Findings

The Panel is bound to apply the ICANN Uniform Domain Name Dispute Resolution Policy (the "UDRP") in order to determine whether Complainant has established the elements necessary to prevail in this matter. The UDRP provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail, and Complainant carries the burden of proof as to each and every element:

- i. Respondent's domain name must be identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- ii. Respondent has no rights or legitimate interests in respect of the domain name; and
- iii. Respondent's domain name has been registered and is being used in bad faith.

### A) Identical / Confusingly Similar

Complainant is the owner of the TAOBAO mark which had been in use for more than six years prior to the registration of the domain name at issue by Respondent. Complainant is perhaps the foremost Chinese Internet company, and it is clear from the party's earliest correspondence that Respondent, who sought out a business relationship with Complainant, was well aware of the mark and its fame. It is clear to the Panel that the domain name at issue is confusingly similar to the TAOBAO mark in which Complainant has rights.

## B) Rights and Legitimate Interests

In the present case the Complainant alleges that Respondent has no rights or legitimate interests in respect of the domain name. Respondent asserts that it sought and received permission from Complainant to use the mark in various domain names, including in the domain name at issue, and that Complainant granted such permission. Complainant alludes to and even purports to selectively quote from correspondence dated 18 May 2010, 15 June 2010, and from some unidentified date in August 2012, all of which purports to show Respondent recognized that it had no rights or legitimate interests in respect of the domain name at issue. However, inexplicably, and in the face of contradictory written evidence attached by Respondent to its Response, Complainant fails to attach the referenced correspondence which allegedly supports its contentions to the Complaint, to the Revised Complaint, or even to the Complainant's Supplemental Submissions. Accordingly, the panel finds Respondent has established that it sought and was given permission to use the domain name in conjunction with Respondent's business relationship with Complainant, and to the extent Respondent has been able to show that it was used in such fashion, as discussed, *infra*, in the discussion of bad faith, Complainant has not been able to establish that Respondent has no rights and legitimate interests in respect of the domain name at issue.

## C) Bad Faith

Complainant has the burden of proving Respondent has registered and is using the disputed domain name in bad faith. Clearly, Respondent received permission to register and use the disputed name from one of Complainant's employees who had apparent authority

Prior to the locking of the domain name at issue, Respondent used it to resolve to a web site which offered goods for sale on Complainant's web site and Respondent places the order on Complainant's web site, resulting in revenue to both Complainant and Respondent. Respondent inspects the goods and ships them on to the customer. Complainant referred to Respondent as a business partner. Complainant does not dispute this, nor does it dispute that their business relationship continued at least until late 2013. Accordingly, as Complainant has failed to establish that Respondent is acting in bad faith.


Accordingly, the Panel finds that Complainant has failed to carry its burden of proof.

This dispute appears to be a business dispute, rather than one concerning bad faith in the registration and use of a domain name. Such disputes are not within the competence of a UDRP proceeding.

## 6. Decision

Accordingly, the Panel denies the relief requested.

Dated: 26 June 2014



M. Scott Donahey  
Presiding Panelist  
for the unanimous Panel



Asian Domain Name Dispute Resolution Centre

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**CORRECTED ADMINISTRATIVE PANEL DECISION**

(Art. 11, ADNDRC Supplemental Rules)

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#### **b. Respondent's Factual Allegations**

Respondent alleges that beginning in late 2009 Respondent and Complainant became involved in a business relationship, pursuant to which Respondent would introduce Complainant's web sites and products to the Russian Market. Response, Annexes 1, 2, 13, and 15. Their business relationship continued through 2010 (Response, Annexes 3, 4, 5, 6, and 7), 2011 (Response, Annex 8), 2012 (Response, Annex 9), and at least into late 2013 (Response, Annexes 10, 11, and 12). During the course of this relationship, Complainant described Respondent as its business partner. Response, Annexes 6 and 7. On one occasion Response asked for and received permission to use the domain name [www.rutabao.com](http://www.rutabao.com) in conjunction with business in Russia. Response, Annex 2. On another occasion Respondent asked for and received permission to use the domain name <rutabao.ru>. Response, Annex 15. Respondent also sought permission to pay for advertisement in the Russian market at its own expense. Response, Annex 4.

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Complainant asserts that the domain name at issue was registered without Complainant's authorization, that Respondent agreed to cease its use, and that Respondent reneged on this agreement, made in writing in an exchange of correspondence with Complainant's counsel. Respondent was not authorized to use the domain name at issue by any employee of Complainant with the authority to do so, and that Respondent therefore had no rights or legitimate interests in respect of the domain name at issue.

Respondent is using the domain name to resolve to a web site which links to Complainant's web site and through which practice Respondent is deriving profits. The use of the domain name at issue is an attempt to profit from the good will established by Complainant in its TAOBAO trademark and as such constitutes bad faith.

#### **B. Respondent**

Respondent argues that Respondent sought and received permission to register the domain name at issue from Complainant in order to use it to further their mutual business arrangement, and that Respondent has used the domain name at issue to the benefit of both parties. Respondent alleges that Respondent and Complainant continued their business relationship at least well into late 2013 and even up to the domain name being locked upon the filing of the Complaint in this matter.

Respondent has spent considerable time and resources in promoting Complainant's business in Russia, which has redounded to the financial benefit of both parties to the business relationship.

Respondent took no steps in relation to the registration of domain names which utilized Complainant's trademark without first seeking permission from Complainant and having been given such permission.

Accordingly, Respondent asserts that Complainant has failed to prove its case.

### **5. Findings**

The Panel is bound to apply the ICANN Uniform Domain Name Dispute Resolution Policy (the "UDRP") in order to determine whether Complainant has established the elements necessary to prevail in this matter. The UDRP provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail, and Complainant carries the burden of proof as to each and every element:

- i. Respondent's domain name must be identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- ii. Respondent has no rights or legitimate interests in respect of the domain name; and
- iii. Respondent's domain name has been registered and is being used in bad faith.

#### **A) Identical / Confusingly Similar**

Complainant is the owner of the TAOBAO mark which had been in use for more than six years prior to the registration of the domain name at issue by Respondent. Complainant is perhaps the foremost Chinese Internet company, and it is clear from the party's earliest correspondence that Respondent, who sought out a business relationship with Complainant, was well aware of the

mark and its fame. It is clear to the Panel that the domain name at issue is confusingly similar to the TAOBAO mark in which Complainant has rights.

### **B) Rights and Legitimate Interests**

In the present case Complainant alleges that Respondent has no rights or legitimate interests in respect of the domain name. Respondent asserts that it sought and received permission from Complainant to use the mark in various domain names, including in the domain name at issue, and that Complainant granted such permission. Complainant selectively quotes from correspondence between Complainant's counsel and Respondent, all of which purport to show Respondent recognized that it had no rights or legitimate interests in respect of the domain name at issue. Complaint, Annex 9. However, the communications from Respondent in this omnibus exhibit contain continuing claims that Respondent had been given permission to use the name at issue and corresponding acknowledgements by Complainant that the two parties were engaged in an ongoing business relationship. Accordingly, the panel finds that the parties were involved in a continuing business relationship, that they had a continuing disagreement concerning whether Respondent was authorized to use the domain name at issue, and that Respondent had produced communications from Complainant that could arguably be viewed as the granting of such permission. Accordingly, the Panel must examine whether Complainant has met its burden to demonstrate that under all of the facts and circumstances Respondent was acting in bad faith.

### **C) Bad Faith**

Complainant has the burden of proving Respondent has registered and is using the disputed domain name in bad faith. Respondent received permission to register and use the disputed name from one of Complainant's employees who had apparent authority

Prior to the locking of the domain name at issue, Respondent used it to resolve to a web site which offered goods for sale on Complainant's web site and Respondent places the order on Complainant's web site, resulting in revenue to both Complainant and Respondent. Respondent inspects the goods and ships them on to the customer. Complainant referred to Respondent as a business partner. Complainant does not dispute this, nor does it dispute that their business relationship continued at least until late 2013. Accordingly, Complainant has failed to establish that Respondent is acting in bad faith.

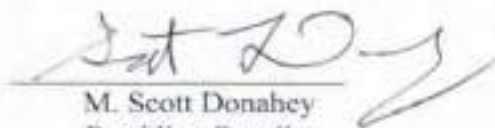
The Panel finds that Complainant has failed to carry its burden of proof.

This dispute appears to be a business dispute, rather than one concerning bad faith in the registration and use of a domain name. Such disputes are not within the competence of a UDRP proceeding.

### **6. Decision**

Accordingly, the Panel denies the relief requested.

Dated: 30 June 2014

  
M. Scott Donahy  
Presiding Panelist  
for the unanimous Panel