

# Asian Domain Name Dispute Resolution Centre

(Kuala Lumpur Office)

## ADMINISTRATIVE PANEL DECISION

AIAC/I/ADNDRC-781-2019

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**Complainant:** Enegra Group Ltd

**Respondent:** John Edwards Nominees Pty Ltd

**Domain Names:** <www.enegra.com> <www.enegra.group>

**Registrar:** NAMECHEAP INC.

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### 1. Procedural History

The Complainant in this case is Enegra Group Ltd a corporation organized under the laws of Malaysia, whose address is Unit 12/F1, Main office Tower, Financial Park, Jalan Merdeka, 87000 Labuan Malaysia (“Complainant”). Their authorized representative in these proceedings is Eli Andrew Weir.

The Respondent is John Edwards Nominees Pty Ltd, whose address is GPO Box 1137 Adelaide, SA 5001 Australia (“Respondent”). Their authorized representative in these proceedings is John Edwards.

The domain names in dispute are <www.enegra.com> <www.enegra.group>. The Registrar of the domain name is NAMECHEAP INC.

On 20 November 2019, pursuant to the Uniform Domain Name Dispute Resolution Policy (“the Policy”), the Rules for the Uniform Domain Name Dispute Resolution Policy (“the Rules”) and Asian Domain Name Dispute Resolution Centre (ADNDRC) Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (“the Supplemental Rules”), the Complainant submitted a Complaint to the Kuala Lumpur Office of the ADNDRC (“the KL office of the Centre”) and elected this case to be dealt with by a single-member panel.

On 22 November 2019, the KL Office of the Centre notified the Respondent of the commencement of the proceedings and the deadline for filing a response is 12 December 2019.

On 11 December 2019, the KL Office of the Centre confirmed the receipt of a Response from the Respondent.

On 13 December 2019, the KL Office of the Centre notified the parties that the Panel in this case had been selected, with Dennis CAI acting as the sole panelist, and the deadline for rendering the decision is 27 December 2019. The Panel determines that the appointment was made in accordance with Rules 6 and Articles 8 and 9 of the Supplemental Rules.

On 27 December 2019, the Panel requested further statements from the parties, and the due date for rendering the decision is extended to 2 January 2020.

## **2. Factual Background**

### *For the Complainant*

The Complainant filed an application for trademark registration on 27 September 2019 in Australia.

### *For the Respondent*

One of the Disputed Domain Names <enegra.com> was registered on 7 July 2011, and is resolved to the website of Enegra Ltd.

### **3. Parties' Contention**

#### *The Complainant*

The Complainant makes the following submissions:

**i) The disputed domain name(s) is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights:**

John Edwards has used his unlawful access to and control of <enegra.com> to host an old version of the Enegra Ltd company website with factually incorrect information regarding the company. This is confusing to the shareholders and customers of Enegra Group Ltd, and is causing us harm and potential financial loss. John Edwards has used his unlawful access to and control of <enegra.group> to alter MX records and setup a mail relay server, such that he is copying all incoming email before forwarding the email onto our legitimate email server.

**ii) The Respondent has no rights or legitimate interests in respect of the domain name(s):**

The Complainant contends that Enegra Group Ltd (Labuan, LL15959) is the sole shareholder of Enegra Trading Ltd (Labuan, LL16164), Enegra Services Ltd (Labuan, LL12280), Enegra Ltd (Australia 152390611), PT Enegra (Indonesia), Enegra Pte Ltd (Singapore, 201135799W), Enegra Trading Ltd (Singapore, 201531712H). John Edwards is not a shareholder or director of any of the companies. He was a service provider and has no legitimate interest in any of the domains.

**iii) The disputed domain name(s) has/have been registered and is/are being used in bad faith:**

The Complainant asserts that John Edwards was paid for the registration and management of the domains, including DNS, email, and website hosting. Earlier this year, when we moved to a new IT services provider. John Edwards refused to transfer the domains <enegra.com> and <enegra.com.au> to our registrar of choice. The Complainant created a new Namecheap account and registered <enegra.group> and <enegra.io>. The new Namecheap account used <anenegra.com> email address. John Edwards then unlawfully restricted our access to the domain management of <enegra.com>. He has also used the password reset function at Namecheap to reset the password on our new Namecheap account and take control of the account, unlawfully preventing our access. The continued deliberate and malicious disruption to our critical systems is designed to cause harm. John Edwards has used his unlawful access to and control of <enegra.group> to alter MX records and setup a mail relay server, such that he is copying all incoming email before forwarding the email onto our legitimate email server. He is now using this to access sensitive and confidential legal and financial data, and has passed this data onto third parties.

### **The Respondent**

The Respondent requests the denial of the Complaint and seeks the following remedies

- The domains shall remain under the control of John Edwards Nominees Pty Ltd.
- All complaints related to the domain names to various bodies in various countries shall be withdrawn or dismissed.
- The Complainant will not raise any future complaints about domain names containing the phrase “enegra”.
- Enegra Group Ltd will indemnify John Edwards and associated entities from any liability or cost arising from complaints about the Enegra domains.

- The complainant will withdraw all complaints to all agencies in all jurisdictions, and provide John Edwards with copies of the withdrawal letters.
- The complainant will pay John Edwards \$1500 for the preparation of this document
- Any entities formed by Messrs Averay, Weir or Vincent after June 2019 are to cease to use the word Enegra in their name.
- Enegra Ltd will pause any application for a trademark until a formal election of directors has occurred.

The Respondent further requests for finding of reverse domain hijacking according to Paragraph 15 of the Rules.

#### **4. Findings**

Paragraph 15(a) of the Rules instructs the Panel as to the principles the Panel is to use in determining the dispute: “A Panel shall decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules, and any rules and principles of law that it deems applicable.”

Paragraph 4(a) of the Policy directs that the Complainant must prove **each of** the following:

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

#### ***A) Preliminary Issues***

(i) Applicable disputes

According to paragraph 4(a) of the UDRP, only disputes concerning the three elements under paragraph 4(a) are applicable under UDRP, and the complainant has the burden of proof to establish its claims. The Panel notes that the Parties have raised disputes concerning issues not directly related to the three above elements, such as the validity of the directors' election of Enegra Ltd, and whether the Respondent and its related companies are deregistered companies, etc. Therefore, the Panel considers that it lacks jurisdiction in ruling issues not directly related to the three elements, and will decide the applicable disputes under paragraph 4(a)

(ii) Remedies sought under UDRP

Under Paragraph 4(i), the remedies available to a complainant are limited to requiring cancelation or transfer of the disputed domain name(s). If a complaint is justifiable panel will decide that a disputed domain name registration should be cancelled or transferred to the complainant, the concerned registrar will normally implement the decision according to UDRP. If the complaint is dismissed, the concerned registrar will unlock the domain name and let the domain name.

***B) Identical or Confusing Similarity***

Under the UDRP, the Complainant is required to establish that it has rights in respect of a trademark and secondly that such trademark is identical or confusingly similar to the disputed domain name. Before the test for identical or confusingly similar, this Panel will first examine whether the Complainant has proved that it has registered trademark rights and common in respect of the name ENEGRA. In the present case, the Complaint relies upon rights in respect of the application for registered trademark for ENEGRA mark

by Energa Ltd. The Panel requested the parties to this case to provide with further information on the relationship between the Complainant (Enagra Group Ltd.) and Energa Ltd. Based on the information submitted by the Parties, the Panel finds that there is no persuasive information proving that the two companies are the same or affiliated with each other.

Nonetheless, it has been a well-established rule in UDRP that a pending trademark application is not sufficient by itself to establish trademark rights within the meaning of UDRP paragraph 4(a)(i). (WIPO Overview 3.0, paragraph 1.1.4) (see for example *Jetgo Australia Holdings Pty Limited v. Name Administration Inc. (BVI)*, WIPO Case No. D2013-1339)

In these circumstances, the Panel finds that the Complainant does not have rights in respect of its application for registered trademark.

The Panel therefore turns to examine whether ENEGRA may be considered to be a common law trademark of the Complainant. Paragraph 1.3 of the WIPO Overview 3.0 addresses the question and provides for a list of evidence for a complainant to successfully assert unregistered or common law trademark. Details are as follows:

*“To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant’s goods and/or services.*

*Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys.”*

In the present case, there is no evidence provided by the Complainant along the lines suggested by the

above provision. According to the information provided by the Complainant (Enagra Group Ltd) was incepted on 3 July 2019. There is no evidence put forward before this Panel showing that the Complainant's ENEGRA mark has required rapid recognition in a short period of time due to the use of the mark by the Complainant.

On this basis, the Panel finds that the Complainant has failed to prove that it has the UDRP-relevant rights in respect of the Disputed Domain Names.

***C) Rights or Legitimate Interests of the Respondent***

For the reasons given under 4(B), the Panel is not required to make any findings for this element.

***D) Bad Faith***

For the reasons given under 4(B), the Panel is not required to make any findings for this element.

***D. Reverse Domain Name Hijacking***

In the supplemental submissions, the Respondent requests for findings of Reverse Domain Name Hijacking, which means using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain, name.

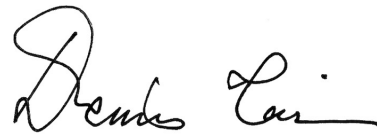
Paragraph 15(e) of the Rules provides that: "If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding."



In light of the facts of this case, the Panel does not accept the Respondent's claim that the Complaint was brought in an attempt at Reverse Domain Name Hijacking and constitutes an abuse of the administrative proceeding. Although Complainant has not succeeded in the current Complaint, there is insufficient evidence to suggest that the Complainant's conduct amounted to reverse domain name hijacking under the Policy.

## **5. Decision**

Having failed to establish at least one of the elements required under the Policy, the Complaint is denied



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Dennis Cai

Sole Panelist

DATED: 2 January 2020