

<u>DR. HERBERT NEVYAS AND</u>)	
<u>DR. ANITA NEVYAS-WALLACE</u>)	
Nevyas Eye Associates)	
Two Bala Plaza, PL-33)	Domain Names In Dispute:
333 E. City Avenue)	<i>NevyasLasik.com</i>
Bala Cynwyd, Pennsylvania 19004)	<i>HerbertNevyasLasik.com</i>
(Complainants))	<i>AnitaNevyasLasik.com</i>
)	
v.)	
)	
<u>DOM MORGAN / n/a</u>)	
P.O. Box 1011)	
Marlton, New Jersey 08053)	
(Respondent))	

COMPLAINANTS’ ADDITIONAL SUBMISSION IN REPLY TO RESPONDENT

Complainants Dr. Herbert Nevyas and Dr. Anita Nevyas-Wallace (“Complainants”) submit this additional submission in reply to the Response filed by Respondent Dom Morgan / n/a (“Respondent”).

[a.] Respondent’s Belated Revisions to His Websites Are Not Evidence of His Rights to the Domains; To the Contrary, They Evidence Respondent’s Bad Faith Prior to His Receipt of the Complaint.

Respondent states that since receiving the Complaint in this matter, he: (1) removed the link on his website to www.lasikinforcenter.com, which contained advertisements for Complainants’ competitors; and (2) revised the title pages of his websites so as to not misleadingly refer to Complainants. Response, at 3, 5, Ex. 5.

Respondent’s removal of commercial links on his website and the edits to his website text do not absolve him from liability in this proceeding, because the Policy focuses on the content of Respondent’s websites before the date the Complaint was filed. Paragraph 4(c)(i) of the Policy states that a respondent may demonstrate “rights to and legitimate interests in the domain name” by showing “*before any notice to you of the dispute*, your use of, or demonstrable 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...” Policy, 4(c)(i).

Moreover, Respondent’s belated revisions are evidence that he used the domains in bad faith before he received the Complaint. See *Comweld Group Pty. Limited v. Comco Industries*

Co. Ltd., Case No. D2001-0290 (WIPO August 31, 2001) (“Respondent’s attempts to change the content of the website are evidence that the registration was not in good faith.”); *St. Lawrence University v. Nextnet Tech c/o Domain Dept*, FA0701000881234 (Nat. Arb. Forum Feb. 21, 2007) (“Respondent has authority to change the website content, and Respondent directed that changes be made to the website’s content and keywords after receiving the Complaint in this proceeding.”); *Granarolo S.p.A. v. Michele Dinoia a/k/a SZK.com*, FA0602000649854 (Nat. Arb. Forum April 17, 2006) (“Respondent’s attempts to change his website provide clear evidence of endeavours to get around the consequences of the bad faith registration of a famous mark.”)

Indeed, if respondents in UDRP proceedings could always avoid liability by making changes after receipt of a UDRP complaint, the UDRP process would be ineffective. There is nothing to prevent Respondent from changing his websites back to the way they were previously once this action is concluded, or making his websites more deceptive, if Respondent is permitted to maintain control of the domains.

For that reason, UDRP proceedings properly focus on the content of the domain names themselves. Here the domain names at issue indicate that they are owned by Complainants, not that they are owned by an individual criticizing Complainants.¹ *Compare The Paxton Herald v. Millard*, FA0207000114770 (Nat. Arb. Forum Aug. 21, 2002).

[b.] Respondent’s Statement That Google - and Not Respondent - Is Responsible For the Way His Websites Appear to Consumers in Search Results is False.

One change Respondent has *not* made since receiving the Complaint is to revise the headlines or “title tags” of his websites, which are displayed to internet users viewing Google search results. The title tags for Respondent’s websites still include phrases such as:

[Welcome to HerbertNevyasLasik.com!](http://herbertnevyaslasik.com/) – herbertnevyaslasik.com/

[Drs. Herbert Nevyas & Anita Nevyas-Wallace](http://herbertnevyaslasik.com/index.php?...) - herbertnevyaslasik.com/index.php?...

[Nevyas Eye Associates](http://www.anitanevyaslasik.com/index.php?...) - www.anitanevyaslasik.com/index.php?...

See Exhibits E and F to Complaint and attached Exhibit 1.

Respondent argues that the way his websites are listed has nothing to do with Respondent’s actions and is a result of Google’s actions. However, Google explains that “title tags” like Respondent’s are authored by website owners themselves. *See, e.g.*, <http://www.google.com/support/webmasters/bin/answer.py?hl=en&answer=35264#3>. When Respondent created his website content, he alone selected the underlined phrases displayed above and in Google search results. These phrases authored by Respondent are part of his websites’ content and are one of the reasons his website content is misleading to consumers.

¹ Respondent argues that “this is a case about Internet gripe sites” but unlike gripe sites, such as *ThisNissanSucks.com*, the domain names here give no indication that their purpose is criticism.

Respondent is also incorrect that no case can be made in this proceeding based on “initial interest confusion.” Respondent’s domain names themselves, coupled with misleading website content such as his “title tags” create initial interest confusion that causes prospective patients to unwittingly visit Respondent’s websites, even if they later realize their mistake. *See Council of American Survey v. Pinelands Web Services*, D2002-0377 (WIPO July 19, 2002) (“Respondent may have a right to refer to the mark in critical content, the wholesale appropriation of Complainant's mark in a domain name, without any distinguishing material, creates confusion with Complainant's business and is not fair use merely for the purpose of criticism...No criticism is apparent from the domain name itself; it is not sufficient that the criticism may be apparent from the content of the site.”)

Respondent essentially admits that his intention is to drive prospective patients of Complainants to his website and to cause harm to Complainants’ reputation and business, stating that “the public has a right to know they are at risk when choosing services by claimant(s).” Response, at 3. Respondent also previously contacted Dr. Stephen Barrett, the Board Chairman of Quackwatch, Inc. (an organization dedicated to consumer protection and health fraud prevention), with his allegations regarding Complainants. *See Exhibit 2* (Emails from Dr. Barrett). Dr. Barrett remarked that he felt Complainants were reputable and that Respondent’s current website may expose him to a libel suit and Respondent replied that his intention with the website was to put Complainants out of business. *Id.* Respondent’s bad faith intent to disrupt Complainants’ business by causing consumer confusion could not be clearer.

[c.] The Litigation Respondent Describes Does Not Concern the Websites At Issue Here and His Statements Regarding Those Disputes Are Inaccurate and Irrelevant in This Proceeding.

It is unnecessary to detail the inaccurate statements made by Respondent regarding underlying disputes with Complainants here, because those statements have no relevance in this proceeding. To summarize, Respondent was unhappy with the results of his medical malpractice lawsuit against Complainants, because Complainants did not commit medical malpractice, and thereafter Respondent began carrying out his stated intention of putting Complainants out of business through internet gripe sites. However, Respondent crossed the line and violated the Policy when he began registering domains comprised of Complainants’ trademarks and including links to Complainants’ competitors on those websites.

Although the parties’ previous litigation also involves Respondent’s websites, the litigation does not concern the domains at issue here. Complainants’ defamation claims against Respondent focused on Respondent’s statements on the website www.lasiksucks4you.com, which is no longer owned by Respondent.

[d.] Respondent Has Not Shown A Legitimate Non-Commercial Fair Use of These Domains and His First Amendment Rights Are Not Implicated.

Finally, although Respondent asserts that he did not obtain click-through fees or any other commercial profit by advertising the services of Complainants’ competitors, this assertion

is unsubstantiated by any evidence. The evidence shows that Respondent's websites link to Complainants' competitors websites and those "hits" are tracked on Respondent's websites. *See* Complaint attached Exhibits. He admits that he links to professionals in the field who may hope that viewers will choose their services and "[m]ost Lasik websites are advertisements for having Lasik eye surgery." Response, at 3. However, he argues "that is not why Respondent Morgan has linked to them." *Id.*

Respondent's internal motivation in linking to these websites is irrelevant; it is sufficient that the disputed domains link to Complainants' competitors. Furthermore, Respondent himself does not have to be a direct competitor of Complainants to have acted in bad faith. *See St. Lawrence University v. Nextnet Tech c/o Domain Dept*, FA0701000881234 (Nat. Arb. Forum Feb. 21, 2007) ("By redirecting Internet users seeking information on Complainant's educational institution to competing websites, Respondent has engaged in bad faith registration and use pursuant to Policy ¶ 4(b)(iii)); *Mission KwaSizabantu v. Rost*, D2000-0279 (WIPO June 7, 2000) (defining "competitor" as "one who acts in opposition to another and the context does not imply or demand any restricted meaning such as commercial or business competitor"); *S. Exposure v. S. Exposure, Inc.*, FA 94864 (Nat. Arb. Forum July 18, 2000) (finding that the respondent registered the domain name in question to disrupt the business of the complainant, a competitor of the respondent); *EBAY, Inc. v. MEODesigns*, D2000-1368 (WIPO Dec. 15, 2000) (finding that the respondent registered and used the domain name <ebay.com> in bad faith where the respondent has used the domain name to promote competing auction sites).

This action does not implicate Respondent's First Amendment rights or his ability to post critical statements regarding Complainants on any of the other domains he owns that do not contain Complainants' trademarks, such as LasikDecision.com, FlawedLasik.com, etc. This action concerns only Respondent's ownership of the domain names NevyasLasik.com, AnitaNevyasLasik.com and HerbertNevyasLasik.com and his registration and use of those domains in violation of the Policy.

For the foregoing reasons, and the reasons described in Complainants' Complaint, the NevyasLasik.com, HerbertNevyasLasik.com, and AnitaNevyasLasik.com domains should be transferred to Complainants.

Respectfully Submitted,



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